91-1149

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CECIL G. NOBLE - - - - - Petitioner

versus

NATIONAL MINES CORPORATION - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is Noble as proven owner of unbroken record title chains for more than ninety years beginning with patent grants from the Commonwealth of Kentucky entitled to quiet title, injunction and damage relief for slander of title and trespass against National?

2. Did National create an issue of superiority of title and fail in proof thereof?

3. Did the Tevis unbroken record title ownership chain extending over a fifty year period void the Amyx and Reid patents?

4. Does the issuance of the Amyx and Reid patents without entry thereunder and without continuing unbroken record title chains to any current ownership void the later issued Totten patents which have unbroken record title ownership chains of more than ninety years to a current owner?

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CECIL G. NOBLE, - - - - - - - *Petitioner,*

v.

NATIONAL MINES CORPORATION, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Cecil G. Noble, Petitioner, respectfully prays the Supreme Court to grant a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on August 14, 1991.

OPINIONS BELOW

The Opinion of the Court of Appeals was not published and is reproduced in the Appendix (1a). The Order of the Court of Appeals denying Petitioner's Petition for Rehearing with Suggestions for Rehearing En Banc was not published and is repreduced in the Appendix (10a). The Judgment of the district court was not published and is reproduced in the Appendix (45a).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 14, 1991. The Court of Appeals Order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc was entered on October 11, 1991. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The current statute is Kentucky Revised Statute 413.150 which provides "KRS 413.150 Actions by the Commonwealth.

The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth the same as to actions by private persons, except where a different time is prescribed by statute."

The statute originated in 1852 as Revised Statutes of Kentucky—1852, section 9, article 3, chapter 63 which provided "9. The limitations prescribed in this chapter shall apply to actions brought by or in the name of the commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision." (page 462)

The same statute with the same wording was again enacted in 1873 as General Statutes of Kentucky, section 10, article 3, chapter 71 which provided "10. The limitations prescribed in this chapter shall apply to actions brought by or in the name of the Commonwealth, in the same manner as to actions by private persons, except where a different time is prescribed by some other chapter in this revision. (a)". (page 633)

STATEMENT OF THE CASE

This is an action by Cecil G. Noble, plaintiff, (hereinafter "Noble"), against National Mines Corporation, defendant, (hereinafter "National"), in which Noble seeks to quiet title to two tracts of real property in Breathitt County, Kentucky and to enjoin National from interfering with Noble's use thereof and for damages resulting from actions of National involving such property, $100,000.00 for slander of title plus compensatory of $65,000,000.00 for willful trespass and conversion of coal before filing of suit plus compensatory of $75,000,000.00 for willful trespass and conversion of coal during the pendency of this action plus punitive damages of $50,000,000.00. (App[1] 13a Compl; 56a a A & S Compl)

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[1]Abbreviations used in this Petition are as follows:

App	Appendix cited to as App ____ a
DC1	First District Court Judgment-Memorandum, Opinion, Order—May 14, 1980
DC2Mem	Memorandum, Opinion and Order of District Court—October 7, 1983
DC2J	Judgment District Court—October 7, 1983
DC3Mem	Memorandum, Opinion of District Court—August 10, 1990
CA1	Court of Appeals Order—November 10, 1981
CA2	Second Court of Appeal Decision—774 F.2d 144—October 4, 1985
CA3	Opinion Court of Appeals, third appeal—August 14, 1991
Com	Complaint—April 7, 1976
P/REM	Petition for Removal to U.S. District Court—May 7, 1976
AmDisc/Answ	Amended Disclaimer and Answer—May 27, 1976

(Continued on next page.)

Noble filed his Complaint in Breathitt Circuit Court in the county in Kentucky wherein the land in issue is located. (App 11a Compl). National filed a "Petition For Removal To The United States District Court For the Eastern District of Kentucky" on the ground that such Court had original jurisdiction because of diversity of citizenship, National being a citizen and resident of the state of Pennsylvania. (App 17a P/REM).

National affirmatively pleaded its ownership by lease of superior title through prior patent grants from the Commonwealth of Kentucky. (App 20a AmDisc&Answ; 29a Answ/Int; 56a A/AC and 63a AA/C)

During the first trial the District Court bifurcated this case taking proof by deposition on Noble's claim to title ownership and on National's claim to superior title and reserving the question of damages. (App 54a CA2 footnote 6, page 9). Prior to the first appeal no issue was addressed relating to National's superiority claim.

The District Court held that Noble as plaintiff in an action to quiet title to real estate has the burden or establishing ownership which burden may be met by proof of title of record from the Commonwealth and dismissed for

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(Continued from preceding page.)

Int Com	Intervening Complaint of Carol Ash—February 6, 1978
Answ/Int Com	Answer of National to Intervening Complaint — April 20, 1978
A&S Com	Fifth Amended and Supplemental Complaint — January 9, 1986
A/AC	Answer to Fifth Amended Complaint — January 17, 1986
AA/C	Amended Answer to Current Complaint — January 27, 1987

failure to carry his burden of proof because of two claimed weak links in Noble's paper title chain. (App 31a DCI).

The Court of Appeals reversed to permit Noble to file documentary evidence strengthening the designated weak links in Noble's title chain. (App 41a CA1I).

On the second trial the District Court without ever having addressed the validity or strength of National's claim to superior title chain ownership, again dismissed Noble's action with the additional judgment that National was determined to be the owner by lease of the property in controversy. (App 44a a DC2MEM; 45a DC2J).

Upon the second appeal the Court of Appeals concluded that the District Court found for National holding that Noble had again failed to establish his chain of title because (1) Noble's conveyance of the partnership property to himself was void and (2) National's chain of title was superior to Noble's claim and held that the burden of proving title to the disputed land rested on Noble as plaintiff; that Noble's conveyance of the partnership property to himself was not void and that Noble's chain of title had not failed as a threshold matter and reversed and remanded to the District Court to determine whether National's chain of title was superior to Noble's chain and the positioning of one of the tracts in dispute. App 17a CA2) The Court of Appeals upheld Noble's unbroken chains of paper title to Tract I containing 165 acres beginning with a patent grant from the Commonwealth of Kentucky to A. J. Totten, issued June 17, 1892 and to Tract II containing 130 acres beginning with a patent to E. R. Totten issued July 13, 1986, both in Breathitt County, Kentucky. (App 47a CA2)

The District Court again bifurcated the remaining trial concluding that the original bifurcation was into three stages, (1) Noble's chain of title, (2) National's chain of

title, and (3) damages; that deposition proof had been completed by both sides regarding stage one and by National and not by Noble regarding stage two and that it was now necessary for Noble to introduce his evidence regarding stage two and that as to title there remained to be decided where the boundaries are and who has the older and better title.

Additional discovery was permitted and sought by both sides regarding the remaining title issues and deposition proof time was set for Noble to first submit evidence as to positioning of his title ownerships followed by National's additional evidence regarding its title ownership chains ending with Noble's rebuttal evidence regarding National's title ownership chains.

Noble filed an Amended and Supplemental Complaint adding allegations for damages for trespass. (App 56a A&S Compl)

National changed its evidence in support of its claim of superiority of title ownership from reliance upon two M. J. Amyx patentes (38830 and 38832) and the Stephen G. Reid patent (47137) to reliance upon five M. J. Amyx patents (38827, 38829, 38830, 38832 and 38834) and the Stephen G. Reid patent. (App 67a DC3Mem)

At the end of the proof taking Noble discovered and filed proof of an unbroken chain of record title beginning with a deed in 1845 and lasting more than fifty years, clearly embracing all of the property in issue. (App 40a CA1) Within the boundaries of the title chain its first owner, Samuel Howard, obtained on November 9, 1849 a survey and on September 15, 1852 a grant based upon such survey to fifty acres and on December 16, 1865 an additional survey and on August 8, 1868 and additional grant based upon such additional survey for another two hundred acres. There

was no proof that such title chain ever connected with the ownership of Noble's Totten patent or National's abandoned Amyx or Reid patents. The last proven deed in such title chain was in 1890 to John Tevis. It was undisputed that no entry was made under the Amyx or Reid patents before the fifty year Tevis title chain was perfected.

After completion of all evidence National abandoned its claim to superiority of title having failed in proof thereof and claimed that the mere existence of the five Amyx and one Reid patent dated prior to the two Totten patents voided the Totten patents without proof of present ownership of the five Amyx and/or Reid patent by anyone. (App 73a DC3Mem; 3a CA3)

Upon completion of the taking of such evidence the District Court entered Memorandum, Opinion and Judgment dismissing Noble's complaint and awarding costs to National which was affirmed by the Court of Appeals and Petition for Reheading was denied. (App 65a DC3; 1a CA3; 39a CA1)

ARGUMENT

1. Noble met his burden of proof by proving ownership of title of record from the Commonwealth by unbroken chains for over ninety years.

As the district court held after the first trial the law is well settled that a plaintiff asserting title has the burden of establishing ownership and in Kentucky that burden can be met in one of three ways: (1)title of record from the Commonwealth; (2) title from a common source; or (3) title by adverse possession, *Marinaro* v. *Deskins,* Ky., 344 S.W. 2d 817 (1961). (App 31a DC1, page 1)

On the second appeal the court of appeals held that Noble had proven his ownership of title of record from the

Commonwealth of Kentucky to the two Totten patent grant tracts of land thereby satisfying his burden of proof as a threshold matter, and reversed and remanded to the district court for its consideration of the issues regarding National's chains of title for the bifurcated issue of superiority of title. (App 54a CA2 page 9)

The Court of Appeals erroneously extended Noble's burden of proof citing *Stewart Lumber Co.* v. *Fields,* 445 S. W.2d 140, 142 (Ky. 1969); *Coleman Mining Co.* v. *McClanahan,* 237 S.W.2d 543, 544 (Ky. 1951); and *Barren County Board of Education* v. *Jordan,* 249 S.W.2d 814, 815 (Ky. 1952) as support for such action. Such authorities are cited as holding that Noble as plaintiff asserting title has the burden of demonstrating the strength of his own title and may not prevail merely by pointing out weaknesses in his adversary's title. It cannot be logically argued that Noble is attempting to prevail by pointing out weaknesses in his adversary's title. Noble's adversary is National. National has admitted that it has no title and has abandoned its attempts to prove any. There is no proof of current ownership of any title based upon Amyx, Reid, Tevis or anyone except the chains from Totten to Noble.

None of the three cited cases sets out the requirements for meeting the burden of proving title. Those requirements are set out in *Marinaro* v. *Deskins, supra* as recited hereinabove.

Stewart Lumber Co. v. *Fields, supra,* held that the burden was not met because the deed under which the plaintiff claimed did not purport to embrace the area which he claimed. *Coleman Mining* v. *McClanahan, supra,* held that the burden was not met because the plaintiff failed to prove her chain of title or to prove the subject property was embraced by plaintiff's referenced deed.

Barren County Board of Education v. *Jordan, supra,* held that the plaintiff owned a determinable fee title subject to defeasance and that defeasance had taken place and plaintiff's title had terminated by its own terms.

Noble proved his ownership of title of record from the Commonwealth of Kentucky by unbroken record title chains to both Totten patents and that such patents embraced the areas in dispute thereby meeting the burden of proof required by *Marinaro* v. *Deskins, supra,* and the plaintiffs in *Stewart Lumber Co.* v. *Fields, supra, Coleman Mining Co.* v. *McClanahan, supra,* and *Barren County Board of Education* v. *Jordan, supra* did not.

Noble's unbroken record title chains begin in the 1890's and last for more than ninety years. Kentucky law holds that proof of an unbroken chain of record title to real estate of fifty years or more creates legal presumptions:

1. That the title chain began with a legal patent from the Commonwealth of Kentucky;

2. That it began with actual legal entry and taking of possession in good faith with the intention of obtaining patents from the Commonwealth;

3. That constructive possession of the outer boundaries of the titled land in the documents existed throughout the fifty year term;

4. That at the expiration of the fifty year term the then owner of the record title chain was the title owner of all lands within the described boundaries of a patent from the Commonwealth of Kentucky, commencing at the beginning date of the record title chain;

5. That issuance by the Commonwealth of Kentucky to someone else of a patent within the same boundaries before the expiration of the fifty year statute of limitations would

give to the new patent holder a right or entry upon the land not theretofore granted by the Commonwealth which would ripen into superior title if, and only if, the patentee exercised his right of entry by taking possession of the lands within his patent boundaries;

6. That the mere issual of the patent would not have the effect to oust or disturb the record title chain holder in his possession without entry of the new patentee within the disputed territory;

7. That if the Commonwealth of Kentucky grants a patent to someone before the expiration of the full fifty year term, that fact alone would do nothing to toll the fifty year statute of limitations which would still ripen into full title with all resultant legal presumptions at the end of the fifty year term, making the title chain owner the owner of a superior title by grant from the Commonwealth at the time of the beginning of his record title chain;

8. And that to perfect valid title patent ownership a person who requires a patent issue by the Commonwealth of Kentucky must exercise the right of entry based thereon and in the absence of such action that patent does not become legally valid as to any third party claimant.

The legal presumptions are based upon the fifty year statute of limitations and adverse possession law. Since 1852 when the statute was first enacted the limitation has been effective against everyone including the Commonwealth of Kentucky.

Kentucky law controlling the effect of a fifty year title chain is contained in the cases of *Buckner's Ex'r* v. *Kirkland's Ex'r.*, Ky., 110 S.W. 399 (1908); *Keaton* v. *Sublett*, 109 Ky. 106, 58 S.W. 528 (1900); *Beeler* v. *Coy*, 48 Ky. (9 B. Mon.) 312 (1848); *Jarboe* v. *McAttee's Heirs*, 46 Ky. (7 B.

Mon.) 279 (1847); *Whitley County Land Co.* v. *Power's Heirs,* 146 Ky. 801, 144 S.W.2d (1912). The applicable Kentucky statute was originally passed in 1852 (section 9, article 3, Chapter 63 of the Revised Statutes of 1852) and again with the same wording in 1873 as General Statutes of Kentucky, section 10, article 3, Chapter 71 and later became KRS 413.150.

2. National created an issue of superiority of title and failed in proof thereof.

Through three trials and two appeals National consistenly pleaded and claimed to have proven ownership in itself under title by unbroken record chain from the Commonwealth of Kentucky emanating from patents senior to Noble's patents thereby constituting superior title to that owned by Noble.

At the end of the first trial the trial court held that National has superior title as between it and the intervening plaintiff and those claiming under her. (App 37a DC1 page 6) At the end of the second trial the trial court held National was the owner by lease as between Noble and National. (App 45a DC2J)

Although National never designated any pleading as a counterclaim, it actively sought and temporarily obtained affirmative relief, adjudging it to be owner by superior title.

Noble cited to the Court of Appeals *Strunks Lane & Jellico Mountain Coal & Coke Co.* v. *Anderson,* 276 Ky. 576, 124 S.W.2d 779 (1939); *Combs* v. *Combs,* 238 Ky. 362, 38 S.W.2d 243 (1931); and *Bennett* v. *Parsons,* 226 Ky. 782, 11 S.W.2d 935 (1928) supporting his contention that this case involves an issue of superiority of title which National admittedly abandoned.

The Court of Appeals held (App 4-5a CA3) contrary to its decision in the second appeal of this case [*Noble* v. *National Mines Corp.*, 774 F.2d 144 (6th Cir. 1985); App 48a CA2 page 3] that the issue of superiority of title is not presented citing *McGiboney* v. *Newman*, 277 Ky. 835, 127 S.W. 2d 860, 863 (Ky. 1939) in support of that holding. The McGiboney case bases its decision upon the determination that the defendant therein alleged its title ownership came from a common source with plaintiff's title ownership chain and not from a separate and conflicting title chain. The McGiboney case is based upon a holding that the plaintiff was unable to prove possession of the property which the evidence showed was in the actual possession of the defendant at the time the action was filed.

The McGiboney case holds that the true distinction between the lines of cases determining whether or not a superiority of title question is presented reveals that it is presented where the suit was filed to prevent the appropriation and conversion of a plaintiff's own title and it is presented where the defendant is making an attack upon and seeking to destroy a link in the plaintiff's chain of title and it is not presented where the defendant is claiming to own title through a chain different from and hostile to the plaintiff's chain of title. Under all three tests the McGiboney decision supports the existence of the superiority of title issue in the present action. National no longer claims to own title through a chain of title different from and hostile to Noble's chain of title. National is making an attack on Noble's title and attempting to destroy a link in Noble's chain of title. Noble's present action is to prevent the appropriation and conversion of his title.

On page 5 of the referenced Court of Appeals decision it states ". . . similar to the facts of the case at bar, if de-

fendant claims the property *through title received from some third party* (emphasis added) which is hostile to plaintiff's title, then McGiboney dictates that a court should not consider defendant's answer a counterclaim. . .". Contrary to the quoted statement National abandoned the claim and no longer claims any title ownership to the property and therefore is no longer claiming ". . . the property through title received from some third party which is hostile to plaintiff's title. . . ".

On page 4 of the referenced decision the Court of Appeals stated "As a factual matter, the District Court found that defendant did not explicitly ask for affirmative relief, *i.e.*, a declaration that its lease was valid as against all other claims to the property." Clearly, such a finding is one of law and not one of fact and the controlling law is that contained in the *Strunks Lane, Combs* and *Bennett* decisions, *supra,* cited by *Noble* and in the *McGiboney* decision, *supra,* cited and misapplied by the Court of Appeals, all of which hold that National did explicitly ask for affirmative relief.

3. The Tevis title chain voided the Amyx and Reid patents.

The evidence established the Tevis title chain as an unbroken chain of record title covering all land in issue beginning in 1845 and lasting for fifty years to 1895. There is no evidence regarding what happened to that title chain between 1895 and the present.

The evidence established that the Amyx patents were issued in 1867 and the Reid patent was issued in 1872 and that no entry was ever made under any of them. National abandoned its attempts to establish unbroken chains of record title to a current owner.

As shown hereinabove, proof of existence of a fifty year unbroken record title chain results in rebuttable presumptions that it began with a valid patent grant and legal entry followed by legal possession during the term. The cited law also holds that the issuance of the Amyx and Reid patents before expiration of the fifty years does not stop the limitations unless legal entry is made. Based upon the evidence herein the Amyx and Reid patents were voided by the Totten chain.

The Court of Appeals held (App 7a CA3 page 6) that because the Reid patent encompasses approximately 154,-800 acres including all lands in controversy issues regarding Amyx patents are not material since Reid covers everything not covered by Amyx. As an "overlap" patent the Reid patent excluded from its coverage thousands of acres previously patented *or otherwise appropriated.* The Tevis record title chain had existed for twenty-seven years with unrebutted presumption of prior patent grant, entry and continued possession when Reid was issued. Surely it qualified as an "otherwise appropriated" exclusion if it did not then qualify as a "previously patented" exclusion.

4. Noble's title ownership is not voided by issuance of the Amyx and Reid patents.

Noble proved and the Court of Appeals held that Noble was the owner of current title by unbroken record title chains from the Commonwealth of Kentucky patent grants extending over a period of more than ninety years. (App. 53-54a CA2 pages 7 and 9)

National proved only that Amyx patents were issued in 1867 and the Reid patent was issued in 1872. The evidence showed that no entry was ever made under the Amyx or Reid patents and National failed and abandoned at-

tempts to establish unbroken record title chains to itself or to anyone else.

The Court of Appeals determined to ignore the fifty year Tevis chain because it "started nowhere and it ended nowhere" (App. 8a CA3 page 7). Actually it started with an unrebutted presumption of a patent grant and valid entry in 1845 when the first deed was executed and recorded. It is true that no evidence was introduced extending the chain beyond 1895 or connecting it with Noble's chain.

The same is true about Amyx and Reid. The evidence showed they began with patent grants in 1867 and 1872 but no evidence is available establishing any entry or possession or title chain to National or to any current claimant.

If Tevis should be ignored Amyx and Reid should be ignored for the same reason.

The fifty year statute of limitations law barring any suit involving title to real estate in Kentucky ran over forty years ago in favor of Noble's title chain. The evidence fails to support any right of action in any other current claimant. If there is ownership of that chain escheated to the Commonwealth of Kentucky. The same would be true as to Amyx and Reid.

The fifty year statute has also been valid against the Commonwealth of Kentucky since 1852. (Revised Statutes of Kentucky of 1852 section 9, article 3 chapter 63; KRS 413.150)

This Court of Appeals decision gives National a license to steal and destroy valid title ownership. It determines that no one owns and no one can own the subject property. It says Tevis doesn't own it, Noble doesn't own it, Amyx doesn't own it, Reid doesn't own it and no one can acquire ownership from the Commonwealth of Kentucky or anyone else. It says National, without ownership can keep

all the coal it has stolen from it and is free to continue to steal the rest of the coal without liability to anyone. It says no one must pay any taxes to any government for its ownership. It makes a confused problem impossible to solve.

Respectfully submitted,

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APPENDIX

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 90-6191/91-5070

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL GARY NOBLE - - - - *Plaintiff-Appellant,*

v.

NATIONAL MINES CORPORATION
(No. 90-6191) - - - - *Defendant-Appellee.*

CECIL GARY NOBLE, - - - - *Plaintiff-Appellee,*

v.

NATIONAL MINES CORPORATION
(No. 91-5070) - - - - *Defendant-Appellant.*

On Appeal from the United States District Court
for the Eastern District of Kentucky

Filed August 14, 1991

Before: MERRITT, Chief Judge; BOGGS, Circuit Judge; and HULL, District Judge.*

MERRITT, Chief Judge. This appeal arises from a protracted dispute over two tracts of land in Breathitt County, Kentucky. It is the third time that the parties are before this Court. The litigation began in 1976 when plaintiff sued

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*The Honorable Thomas G. Hull, Chief Judge for the United States District Court for the Eastern District of Tennessee, sitting by designation.

defendant to quite title to the land, to enjoin defendant from interfering with his use of the land, and to recover damages as a result of defendant's use of the land. Plaintiff seeks to overturn the decision of the District Court in which the court ruled for denfendant on all counts after full trial. As to this issue, we affirm the District Court's decision. In another appeal consolidated with this matter, defendant seeks to overturn the District Court's order forcing it to pay plaintiff's share of the special master's fee. Regarding the special master's fee, we reserve opinion temporarily on this matter while chief settlement attorney for the Court, Mr. Robert Rack, attempts first to resolve this issue by encouraging negotiation between the parties.

BACKGROUND

The full facts of this case were discussed in *Noble* v. *National Mines Corp.*, 774 F.2d 144 (6th Cir. 1985). It is important to note that the two disputed tracts of land are in rural eastern Kentucky and that neither party resides on the land or is in actual possession of it, although defendant continues to extract coal from the property. Also, each party claims the property under chains of title originating from different patent grants from the Commonwealth of Kentucky in the 1800s.

In the first appeal in this case, this Court in an unpublished opinion reversed the District Court's finding that plaintiff had failed to establish valid title to the property. The reason for reversal was that the District Court had refused to reopen the evidence so that plaintiff could introduce further proof to support his claim of title.

On remand, both parties provided additional support for their respective claims to title. The District Court found for defendant, concluding that: (1) there was a missing link in plaintiff's chain of title because of an unauthorized partnership deed to plaintiff and, alternatively, (2)

even without considering the unauthorized partnership deed, plaintiff's claim to title was inferior to defendant's. Plaintiff appealed and this Court again reversed. First, we found that the partnership deed to Noble was not void on its face. Second, we ruled that plaintiff should be allowed to present additional evidence regarding the location of the disputed tracts of land, this proof being relevant because plaintiff alleged defendant's patents did not completely embrace the land plaintiff claimed through his patents.

On remand, the District Court assigned this matter to a special master, a specialist in Kentucky land disputes. This person considered additional evidence from both parties and found a defect in plaintiff's claim to title. The District Court separately considered the issue and also ruled for defendant on the same grounds as the special master. In this final appeal, the essence of plaintiff's argument is that the District Court erred in finding that the patents through which plaintiff claims title were inferior to other, earlier patents covering the same land.

I.

On appeal, plaintiff repeatedly argues that defendant did not prove the validity of its chain of title. However, in our previous decision in this matter, this Court held that "[i]f Noble is unable to demonstrate valid title to the property, any defects in National's chain of title are irrelevant." *Id.* at 146. In so holding, we cited *Stewart Lumber Co.* v. *Fields,* 445 S.W.2d 140, 142 (Ky. 1969)(plaintiff asserting title has "burden of demonstrating the strength of his own title and may not prevail merely by pointing out weaknesses" in his adversary's title) and *Coleman Mining Co.* v. *McClanahan,* 237 S.W.2d 543, 544 (Ky. 1951) (stating that "[i]t is well settled that in an action for trespass when the issue of title is raised, the burden is upon the

plaintiff to prove his title"). *See also Barren County Board of Education* v. *Jordan*, 249 S.W.2d 814, 815 (Ky. 1952) (in trespass case, plaintiff "must rely on the strength of its own title, and cannot recover on the weakness of the defendant's title").

Plaintiff asserts that this reading of Kentucky law is incorrect. Instead, he argues that the District Court should have reviewed all the evidence as to both plaintiff and defendant's competing claims. He premises this argument on the theory that defendant sought affirmative relief, either explicitly or implicitly, in that defendant wanted the validity of its title upheld. Plaintiff cites several old cases for the proposition that Kentucky law requires the trial court in such cases to consider the validity of both plaintiff and defendant's claim to title.

As a factual matter, the District Court found that defendant did not explicitly ask for affirmative relief, i.e., a declaration that its lease was valid as against all other claims to the property. Reviewing defendant's answers, it appears that defendant only once explicitly asked for a declaration that its leasehold interest was valid, and that was in its answer to an intervening complaint filed by Carol Ash. Because this complaint was withdrawn, and Ash is no longer party to this suit, the District Court did not err in its factual determination that defendant did not ask for affirmative relief as to this plaintiff.

Plaintiff cites several older Kentucky cases which provide that sometimes a defendant's answer is, in reality, a counterclaim asking the court to find that defendant possesses valid title to the property at issue. *See, e.g., Strunks Lane & Jellico Mountain Coal & Coke Co.* v. *Anderson*, 276 Ky. 576, 124 S.W.2d 779 (1939); *Combs* v. *Combs*, 238 Ky. 362, 38 S.W.2d 243 (1931). As a consequence, these Kentucky courts have ruled that trial courts must compare evidence as to plaintiff *and* defendant's respective claims to

title, seemingly in conflict with the law of this case that plaintiff bears the burden of proving valid title to the property. For example, in *Strunks Lane*, the defendant asserted title to the disputed property and the court ruled that the defendant's answer was, in effect, a counterclaim. 124 S.W. 2d at 780. Aa a result, the court said, all evidence must be considered and the trial court should have considered whose title was superior. *Id.* In *Strunks Lane*, the court remanded the case because the trial court had not inquired sufficiently into either plaintiff or defendant's claim to title. *Id.* at 781.

Another older case cited by plaintiff is *Bennett* v. *Parsons*, 226 Ky. 782, 11 S.W.2d 935 (1928). Defendant in *Bennett* was in possession of the property in question. The highest Kentucky court held that plaintiff could maintain a quiet title suit. *Id.* at 936. Importantly, the court ruled that, although defendant did not specifically ask for affirmative relief in its answer, his answer must be taken as a counterclaim because there was no way he could succeed without showing plaintiff's deed to be fraudulent. *Id.* In fact, the *Bennett* court seems to have put the burden on defendant to show that plaintiff "acquired her title by fraudulent means." *Id.* at 937. *But see Cumberland Co.* v. *Kelly*, 156 Ky. 397, 160 S.W. 1077, 1078 (1913) (defendant not deemed to have made a counterclaim, which would have necessitated inquiry into which party had superior title, where defendant was in possession and merely asserted title and possession in himself).

We feel that *McGiboney* v. *Newman*, 277 Ky. 835, 127 S.W.2d 860, 863 (Ky. 1939), resolves this apparent conflict. This case by Kentucky's highest court instructs us to focus on the source of plaintiff and defendant's relevant claims to title. The court in *McGiboney* makes a distinction between whether defendant claims the property through a chain of title different from and hostile to plaintiff's or

through the same source as plaintiff. According to *McGiboney*, if defendant and plaintiff claim title through the same source, then a court must look into the validity of each party's claim to title, even if defendant has not explicitly asked that his claim to title be declared superior. However, similar to the facts of the case at bar, if defendant claims the property through title received from some third party which is hostile to plaintiff's title, then *McGiboney* dictates that a court should *not* consider defendant's answer a counterclaim, instead focusing only on the validity of plaintiff's claim to title. *Id.* Accordingly, based on *McGiboney* and the more recent cases, *Stewart Lumber Co.*, *Coleman Mining Co.*, and *Barren County Board of Education*, we see no reason to alter our previous decision on this matter and accordingly put on plaintiff the burden of proving the validity of his claim to title.

II.

We next analyze whether plaintiff met his burden of proving valid title to the disputed tracts of land. Under Kentucky law, there are three ways in which plaintiff can establish title to the disputed land: "(1) paper title deducible from the Commonwealth; (2) adverse possession for the statutory period; and (3) title to a common source." *Noland* v. *Wise*, 259 S.W.2d 46, 48 (Ky. 1953) (citation omitted). Plaintiff does not claim valid title by adverse possession or from a common source. Instead, his claim relies on two patents issued by Kentucky: (a) the E.R. Totten Patent No. 65798, which was issued on June 26, 1896 and covers the lower 130 acres of the disputed land (referred to as the "lower Totten patent") and (b) the A.I. Totten Patent No. 65181, which was issued on July 13, 1892 and covers the upper 165 acres (referred to as the "upper Totten patent").

It is undisputed that under Kentucky law, from the time of the Totten grants to today, only vacant and unappropriated land can be validly patented. *See Nolen* v. *Hall*, 26 Ky. L. Rptr. 773, 82 S.W. 418, 418 (Ky. 1904) (discussing statute in effect when all patent grants relevant to this case were made). The District Court found that the upper and lower Totten patents were invalid because other, earlier patents encompassed the land. Specifically, the District Court found that eight patents issued to M.J. Amyx covered all of the lower Totten patent and approximately sixty percent of the upper Totten patent. Issued in 1867, the Amyx patents are clearly senior to, and therefore superior to, the upper and lower Totten patents, issued in 1892 and 1896 respectively.

In February 17, 1872, an "overlap" patent was issued to Stephen Reid. This patent encompasses approximately 154,800 acres and had the effect of giving to Reid all land within the area not previously patented. It is undisputed that the boundaries of the Reid patent include within it all the land in the upper and lower Totten patents (in other words, all land in this dispute). The District Court found that the Reid patent had the effect of giving to Reid in 1872 all lands not covered by the earlier Amyx patents in the disputed area, primarily the 40 percent of the upper Totten patent. Since plaintiff does not claim title through the Reid patent, his claim to title through the Totten patents, which were issued after the "overlap" Reid patent, must be invalid. Furthermore, once the Reid patent is found to convey validly all land in the disputed area not patented to someone else before 1872, it is correct to ignore, as the District Court did, all plaintiff's arguments regarding the overlap of the Amyx and Totten patents. Because the disputed land fell well within the Reid patent's coverage of over 154,000 acres, it is immaterial exactly what the Amyx patents cover because the Reid "overlap" patent had

the effect of giving Reid good title in 1872 to what was not covered in the Amyx patents. Because Reid possessed good title to all previously unpatented land in the area in 1872, the subsequently-issued Totten patents were invalid because the Commonwealth of Kentucky had already parted with the land it purported to give to the Tottens some twenty years later. Accordingly, the District Court did not err in deciding that plaintiff's claim to title through the Totten patents was invalid.

III.

Plaintiff's alternative argument for reversal on the merits can be disposed of rather quickly. He claims that a series of four deeds (collectively referred to as the "Tevis" chain of title), dating from 1845 to approximately 1890, and putatively covering the disputed land, somehow operated to invalidate the Reid and Amyx patents, but not the Totten patents through which plaintiff claims title to the land. The District Court found that the Tevis chain of title "started nowhere and it ended nowhere" and we agree. Plaintiff never showed *how* Tevis initially got title to the disputed property—no adverse possession, grant from the Commonwealth or common source origin—and plaintiff never connected the Tevis chain of title, assuming it could be proved valid, with his own claim to title. Accordingly, this argument must also fail.

IV.

Consolidated with this appeal on the merits is a separate appeal regarding the payment of the special master's fee in connection with this case. The District Court initially ordered each party to pay one-half the cost of the special master, approximately $4,000 each. Several months passed without payment by plaintiff. When the District Court inquired as to why plaintiff had not paid his share of the

fee, plaintiff stated that he was destitute. The District Court asked plaintiff five questions regarding his income and assets, which plaintiff answered by affidavit. The District Court then required defendant to pay as an initial matter plaintiff's share of the special master's fee. Because defendant had earlier been awarded its costs in this case, the District Court increased the amount of defendant's costs by the same amount.

We reserve judgment on this issue, pending settlement negotiations by the parties. If no mutual agreement is reached by the parties within a reasonable time, we will issue an order deciding this matter. Otherwise, as to the decision of the District Court on the merits of the land dispute, we AFFIRM.

Attest:

Leonard Green, Clerk

(s) By Diane Schnur
Deputy Clerk

Issued as Mandate: 10/29/91
Cost: No Cost

No. 90-6191/91-5070

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL GARY NOBLE, - - *Plaintiff-Appellant* (90-6191), *Plaintiff-Appellee* (91-5070),

v.

NATIONAL MINES CORPORATION, - - *Defendant-Appellee* (90-6191), *Defendant-Appellant* (91-5070)

ORDER—Filed October 11, 1991

BEFORE: MERRITT, Chief Judge; BOGGS, Circuit Judge; and HULL*, Chief Judge, United States District Court.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Entered by Order of the Court

(s) Leonard Green
Leonard Green, Clerk

*Hon. Thomas G. Hull sitting by designation from the Eastern District of Tennessee

BREATHITT CIRCUIT COURT

File No. 4752

CECIL G. NOBLE - - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION,
a Pennsylvania corporation - - - *Defendant*

COMPLAINT—Filed April 7, 1976

Comes the plaintiff, CECIL G. NOBLE, and for his cause of action, states to the Court as follows, to wit;

(1) That the defendant, NATIONAL MINES CORPORATION is a Pennsylvania Corporation organized and existing under the laws of the State of Pennsylvania with the power to sue and be sued with principle offices in Pittsburgh, Pennsylvania at 2800 Grant Building.

(2) That the plaintiff herein, CECIL G. NOBLE, is the fee simple owner of certain property in Breathitt County, Kentucky, more particularly bounded and described as follows:

TRACT I:

"Beginning at a small chestnut at the base of a large chestnut and dogwood and sourwood pointers S 65° 20′ E 65 poles from two beeches at the base of the spur between the upper force of Wolf Pen Creek the beginning corner of two patents in the name of R. P. Davis, Nos. 40439 and 40444; thence a patent in the name of Wilson Barnett, No. 41040; thence with the closing line of said Barnett's survey S 65° 20′ E 11 poles 9 links to a small beech tree a large

poplar and beech tree S. 56° W 1 pole and 10 links from beech and poplar pointers; thence S 65° 20′ E 102 poles and 16 links in all 113 poles to a stake on the ridge between Wolf Pen and Spring Fork; thence with the meanders of the top of the ridge around the head of Wolf Pen S 17° 30′ E 32 poles to a chestnut oak; thence S 53° 30′ E 14 poles to a pine; thence South 60 poles to a chestnut oak; thence S 42° E 38 Plies to a chestnut oak; Thence S 38° E 28 poles to three pines; thence South 60 poles to a hickory on the knob head of Wolf Pen; thence N 81° W 46 poles to a black oak; thence N 35° W 35 poles to a black oak N 7° W 23 poles to a stake; thence S 63°; W 30 poles to a stake in a low gap at the head of Sugar Camp Branch; thence N 85° W 38 poles to a pine on a high knob between Wolf Pen and Quicksand; thence N 52° W 52 poles to a chestnut oak; thence N 65° W 28 poles to a stake; thence N 14° E 150 poles to the beginning, being 165 acres, more or less."

TRACT II:

"Beginning at a stake midway between a twain dogwood and a small basket oak, said basket oak being East 44 links from said dogwood it being N 85° W 25 poles from two beeches, a white oak and a hickory near the mill site on Wolf Pen Creek, and the corner of two patents in the name of R. P. Davis; thence S 57° 30′ W 12 and ½ poles to a chestnut oak tree, a small black gum on a spur above two large notable rocks; thence same course 91 and ½ poles, in all 104 poles to a stake on the ridge near a low gap at the head of Negro Branch; thence S 42° E 16 poles to a stake, S 11° 30′ W 36 poles to a stake, S 37° E 20 poles to a stake in the gap head of Mill Hollow; thence S 37° E 13 poles to a stake, S 16° 45′ W 19 poles to a twain dogwood; thence S 49° 15′ E 45 poles to a stake; S 38° 30′ E 14 and ½ poles to a chestnut oak; thence N 78° E 19 poles to a white oak; thence N 68° E 20 poles to a sourwood in a low

gap at the head of Alum Cave Branch; thence N 68° E 18 poles to a forked chestnut oak; thence S 83° E 10 poles to a black oak; thence S 27° 30′ E 8 poles to a stake, S 16° 30′ W 12 poles to a pine; thence S 8° 45′ E 18 poles to a chestnut oak; thence S 38° E 24 and ½ poles to two black oaks on a knob at the line of Davis Patent No. 40439; thence with the line of same N 46° 20′ E 60 poles to a stake; thence with Davis Patent No. 40443, N 40° 40′ W 103 poles to a stake; thence N 16° 40′ W 116 poles to the beginning, being 130 acres, more or less."

(3) That the defendant, NATIONAL MINES CORPORATION, as agents or employees, has set up claims thereto hostile and adverse to plaintiff's land by words and actions, thereby casting a cloud of title upon same.

(4) Further, that due to said conduct in behalf of the defendant its agents or employees, the defendant has prevented plaintiff of the use of said lands, damaging him in the sum of One Hundred Thousand ($100,000.00) Dollars.

WHEREFORE, the plaintiff demands judgment against the defendant, NATIONAL MINES CORPORATION, quieting the title to his lands; that the defendant be enjoined from further interfering with the plaintiff's use of his lands; for judgment in the sum of One Hundred Thousand ($100,000.00) Dollars with interest at the rate of eight (8%) percent from the date of judgment until paid; for his costs herein expanded and for all other equitable and proper relief.

(s) Richard L. Fain
Richard L. Fain

Attorney at Law, Campton, Ky.

BREATHITT CIRCUIT COURT

C.R. 4752

CECIL G. NOBLE - - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

DISCLAIMER AND ANSWER

April 27, 1976

The defendant, for its disclaimer and answer herein, states:

DEFENSE I

The defendant disclaims any interest in the title to the lands described in the complaint, and have never asserted any claim or interest in the said lands.

DEFENSE II

The complaint fails to state a cause of action against the defendant upon which relief can be granted.

DEFENSE III

The defendant admits paragraph one (1) of the complaint.

It has no knowledge or information upon which to form a belief as to the truth of paragraph two (2) of the complaint.

It denies all the remaining allegations of the complaint not herein admitted.

WHEREFORE, the defendant demands that the complaints against it be dismissed and that the plaintiff recover

nothing thereby, and that the defendant recover its costs and all proper relief to which it may be entitled.

Combs & Combs
P. O. Drawer 189
Prestonsburgh, KY 41653

(s) Paul C. Combs
Paul C. Combs
Attorneys for Defendant

I certify a copy of the forgoing Disclaimer and Answer has this day been mailed, postage prepaid, to Mr. Richard L. Fain, Campton, Kentucky, attorney for Plaintiff, this 27th day of April, 1976.

(s) Paul C. Combs
Attorney for Defendant

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE, - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION,
a corporation, - - - - - - - *Defendant*

PETITION FOR REMOVAL TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Filed May 7, 1976

To: THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF KENTUCKY

The petitioner, National Mines Corporation, a corporation, for removal of this action from the Breathitt Circuit Court, Breathitt County, Kentucky, to the United States District Court for the Eastern District of Kentucky, respectfully show to this honorable court:

(1) That the plaintiff, Cecil G. Noble, filed suit against this defendant-petitioner, in the Breathitt Circuit Court, Civil Action File No. CR 4752, on April 7, 1976. A copy of the summons, complaint, disclaimer and answer, notice and motion to file amended disclaimer and answer and the amended disclaimer and answer tendered with said motion, in that action, are attached hereto and constitute all process, pleadings and orders served upon the petitioner in such

action and the foregoing constitutes all process, pleadings and orders filed and entered in the above entitled cause.

(2) The petitioner alleges that summons was served upon the defendant-petitioner, National Mines Corporation, on April 13, 1976.

(3) That the amount in controversy exceeds, exclusive of the interest and costs, the sum and value of Ten Thousand ($10,000.00) Dollars.

(4) The defendant-petitioner, National Mines Corporation, a corporation, is a Pennsylvania corporation; and was such at the time of all of the occurrences as alleged in plaintiff's complaint, was such at the time of the commencement of this action, has been such at all times since the date of the alleged occurrences of which the complaint is made, and still is a corporation duly organized and existing under and by virtue of the laws of the State of Pennsylvania, and was at the time of the alleged occurrence of which complaint is made, at the time of the filing of the complaint, and has been at all times since said alleged occurrences, and still is a citizen and resident of the State of Pennsylvania, and of no other state, having its principal office and place of business in the City of Pittsburgh, State of Pennsylvania. The defendant-petitioner at the time and times of the alleged occurrences as made in the complaint, at the time of filing of the complaint, and at all times since the date of said alleged occurrences was and still is a nonresident of the State of Kentucky, and did not have at the time of the alleged occurrence of which complaint is made, or at the time of the filing of the complaint, and does not now have and has never had, its principal office and place of business, or a principal office and place of business in the State of Kentucky.

(5) That the plaintiff, Cecil G. Noble, was, at the time of the alleged occurrence or occurrences of which com-

plaint is made, a citizen and resident of Louisville, Jefferson County, Kentucky, and he is now and was at the time the suit was instituted, a citizen and resident of Louisville, Jefferson County, Kentucky. The plaintiff was not, at the time of the elleged occurrence or occurrences, or at the time of the filing of this action, nor is he at the present time, a citizen and resident of the State of Pennsylvania.

(6) That this is a civil action brought in a State Court of which the United States District Courts have original jurisdiction because of diversity of citizenship, and the defendant is not a citizen of the State of Kentucky in which the action was brought.

(7) The petitioner files and presents herewith a bond, with good and sufficient surety, in the penal sum of Five Hundred ($500.00) Dollars, conditioned as required by law on that behalf duly made and provided, that petitioner will pay all costs and disbursements incurred by reason of this removal proceeding should it be determined that this case is not removable or is improperly removed.

Wherefore, the petitioner, National Mines Corporation, a corporation, pray that the bond filed herewith will be accepted and approved, and that this action be removed to and entered upon the docket of this Court.

Combs & Combs
P.O. Drawer 189
Prestonsburg, Kentucky 41653

(s) Paul C. Combs
Paul C. Combs

STATE OF KENTUCKY
COUNTY OF FLOYD SCT.

Affiant, Paul C. Combs, being duly sworn, states that he is the attorney for the defendant-petitioner, National Mines Corporation, a corporation, in the above styled cause of action, and that the facts as stated in this petition are true as he verily believes.

(s) Paul C. Combs
Paul C. Combs

Subscribed and sworn to before me by Paul C. Combs, this 7th day of May, 1976.

My commission expires: 5-14-78

(SEAL) (s) Imogene Nelson
Notary Public, State-at-large, Kentucky

BREATHITT CIRCUIT COURT

CR No. 4752

CECIL G. NOBLE, - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION, - - - *Defendant*

AMENDED DISCLAIMER AND ANSWER

Filed May 27, 1976

The defendant, National Mines Corporation, for its Amended Answer herein, refers to and adopts and makes a part hereof, the defenses set out in its original answer, except as amended hereinafter:

Defense I of the original disclaimer and answer is withdrawn and the following is substituted in lieu thereof:

DEFENSE I

Defendant is the owner of the coal, surface rights and privileges in, upon and underlying the tracts of land described in the complaint, which interests therein were conveyed by Harry Laviers, Sr. and others. Trustees of Evans-Laviers Real Estate Trust to Western Pocahontas Corporation, by deed dated May 15, 1963, which deed is of record in Deed Book 112, Page 22, Breathitt County Court Records, which deed is referred to for a more particular description of the lands conveyed therein.

By Deed of Lease, dated January 1, 1971, Western Pocahontas Corporation leased the coal, surface rights and privileges in a boundary of land embracing the tracts of

land described in the complaint, to Evanston Coal and Land Company.

Evanston Coal and Land Company thereafter was merged with and made a part of National Mines Corporation, which Company has been at all times mentioned in the complaint and is now owner of the coal, surface rights and privileges for the purpose of mining the said coal in the tracts described in the complaint.

WHEREFORE, the defendant demands the complaint be dismissed, and that the plaintiff recover nothing thereby; that it recover its costs and all proper relief to which it may be entitled.

COMBS & COMBS
P.O. Drawer 189
Prestonsburg, Kentucky 41653

(s) Paul C. Combs
Paul C. Combs

I hereby certify that a true and correct copy of the foregoing Amended Disclaimer and Answer was this day mailed, postage prepaid, to Mr. Richard L. Fain, Campton, Kentucky, attorney for plaintiff, this 5 day of May, 1976.

Attorney for Defendant

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

CAROL ASH - - - - - - *Intervening Plaintiff*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

CAROL ASH - - - - - - *Cross-Complainant*

v.

CECIL G. NOBLE - - *Plaintiff and Cross-Defendant*

COMPLAINT—Tendered February 6, 1978

Comes the Intervening Plaintiff and Cross-Complainant, CAROL ASH, in person, and by Counsel, and states as her cause of action as follows:

I. **Jurisdiction**

1. That CAROL ASH, hereinafter known as "ASH", was during the times hereinafter described, and is now a resident of Louisville, Jefferson County, Kentucky; and that during such times as hereinafter mentioned, and is at present, not a resident of the Commonwealth of Pennsylvania.

2. That the Defendant, NATIONAL MINES CORPORATION, hereinafter known as "NATIONAL" is a Pennsylvania Corporation with its principal place of business in Pennsylvania, and that during the times as hereinafter described, and is at present so situation as so pled in said Defendant, NATIONAL'S *Petition for Removal to United States District Court for the Eastern District of Kentucky, Paragraph 4;*

3. That the Plaintiff, Cross-Defendant, CECIL G. NOBLE, hereinafter known as "NOBLE" was at the time the above captioned action was filed and is now a resident of Louisville, Jefferson County, Kentucky and at such time so mentioned was not, and is not now a resident of the State of Pennsylvania.

4. That subject property is situated within the jurisdiction of the United States District Court for the Eastern District of Kentucky as said subject property is located in Breathitt County, Kentucky, the amount of controversy is more than $10,000.00;

5. This Court has jurisdiction of this action so tendered by "ASH" in that:

A. Jurisdiction of the original action has qualified and been so accepted;

B. "ASH'S" Complaint exceeds $10,000.00 in controversy;

C. The diversity required of the parties is present in that "ASH" is likewise a resident of the Commonwealth of Kentucky, and is not, nor ever been a resident of the Commonwealth of Pennsylvania;

II. **First Cause of Action; Cross-Claim**

Comes the Intervening Plaintiff, Cross-Complainant, CAROL ASH, and for her cause of action states as follows:

6. That the above stated paragraphs are incorporated in this cause of action by reference as if fully stated herein;

7. That CAROL ASH is the owner of the subject property of the hereinabove caption action, being the same property as more particularly described in the deeds attached hereto being Exhibits A and B; that CECIL G. NOBLE is not the owner of said property;

8. That prior to October 28, 1974, CAROL ASH loaned the purchase money, ($20,000.00) for said property to the Kentucky Partnership known as Apollo Company;

9. That the Apollo Company, thereafter on October 28, 1974, purchased said property from VIRGINIA GUNN SHIPLEY and ALEX B. SHIPLEY, et al., as described in the Special Warranty Deed as shown in Exhibit A;

10. That the above described loan was not repaid to CAROL ASH and after several demands, two of the partners of Apollo Company, ROBERT H. FINE and CHARLES DARNELL, pursuant to their partnership agreement, which is marked Exhibit C and attached hereto, conveyed the subject property back to CAROL ASH in forgiveness of the hereindescribed loan and accrued interest thereon, by Deed dated the 22nd day of November, 1976, and recorded in the Office of the Clerk of the Breathitt County Court, Breathitt County, Kentucky in Deed Book 132 Page 602 and attached hereto as Exhibit B;

11. That CAROL ASH has paid the property taxes on said property, and has, on several occasions, negotiated leases to mine said property;

12. That CECIL GARY NOBLE is not the fee simple owner of said property, and that the Deed filed in the Office of the Clerk of the Breathitt County Court, Breathitt County, Kentucky in Deed Book 129, Page 341 (Attached as Exhibit D), to the best of CAROL ASH's knowledge is a sham in that Apollo Company was never paid the $20,000.00 consideration as described herein (See Affidavit of ROBERT H. FINE, Exhibit E).

13. That by his actions, CECIL GARY NOBLE has placed a cloud upon the title of said property, and has damaged CAROL ASH in the amount of $10,000.00;

14. That by his actions, CECIL GARY NOBLE has caused an erroneous and false document to be put to record, to wit, the above described deed from Apollo Company to CECIL GARY NOBLE, as put to record in the Office of the Clerk of the Breathitt County Court, Breathitt County, Kentucky, in Deed Book 129, Page 341, and for such actions, punitive damages should be awarded in favor of CAROL ASH and against CECIL GARY NOBLE in the amount of $20,000.00.

III. **Second Cause of Action: Intervening Complaint**

Comes the Intervening Plaintiff, Cross-Claimant, CAROL ASH, and for her second cause of action states as follows:

15. That CAROL ASH incorporates paragraphs 1 through 12 above in this cause of action as if fully stated herein and that CAROL ASH hereby asserts her fee simple ownership of said subject property;

16. That as fee simple owner of said property, CAROL ASH adopts by reference the Complaint herein filed by CECIL G. NOBLE as Plaintiff, and adopts that Complaint as her own, as if fully stated herein, and as against the Defendant, NATIONAL MINES CORPORATION, such that CAROL ASH shall become the Plaintiff in said action and thereby protect her fee simple interest in said property.

WHEREFORE, the Intervening Plaintiff, Cross-Complainant, CAROL ASH, respectfully demands:

I. As to her first cause of action:

1. Judgment in favor of CAROL ASH and against CECIL GARY NOBLE, such that:

A. CAROL ASH is adjudged to be the fee simple owner of the subject property;

B. Compensatory damages in the amount of $10,000.00;

C. Punitive damages in the amount of $20,000.00;

2. That CECIL GARY NOBLE hereafter be enjoined from interferring with CAROL ASH's right to said subject property;

3. Her costs in maintaining this action, including a reasonable attorney's fee; and

4. All other relief to which she may appear entitled.

II. As to her second cause of action:

1. Judgment in favor of CAROL ASH and against NATIONAL MINES CORPORATION such that:

A. CAROL ASH is adjudged to be the fee simple owner of the subject property, thus quieting title of said property;

B. Compensatory damages in the amount of $10,000.00;

2. That NATIONAL MINES CORPORATION be hereinafter enjoined from interferring with her use of said property;

3. For costs in maintaining the action to include a reasonable attorney's fee.

4. All other relief to which she may appear entitled.

(s) J. Fox DeMoisey
J. Fox DeMoisey
Attorney for CAROL ASH, Intervening Plaintiff and Cross-Claimant
105 South Sherrin Avenue
Louisville, Kentucky 40207
Telephone: 896-2301

VERIFICATION

I hereby certify that the foregoing statements are true as I verily believe this 1st day of February, 1978.

(s) Carol L. Ash
Carol Ash

STATE OF KENTUCKY
COUNTY OF JEFFERSON } SS.

Signed and subscribed to before me by CAROL ASH to be the truth to the best of her knowledge and belief this 1st day of February, 1978.

My Commission Expires: Jan. 22, 1979.

(s) J. Fox DeMoisey
Notary Public

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE, KENTUCKY

CA No. 76-370

CECIL G. NOBLE and CAROL ASH, and
CROSS COMPLIANANT - - - - - - *Plaintiffs*

v.

NATIONAL MINES CORPORATION, - - - *Defendant*

ANSWER OF NATIONAL MINES CORPORATION TO INTERVENING COMPLAINT

Filed April 20, 1978

The defendant, National Mines Corporation, for its answer to the intervening complaint herein, states:

DEFENSE I

The intervening complaint fails to state a cause of action against the defendant upon which relief can be granted.

DEFENSE II

National Mines Corporation admits the section on jurisdiction, designated I. Jurisdiction, paragraph 12 of the intervening complaint and cross complaint.

It denies paragraph 7 for the reason she and the plaintiff own no interest in the real estate which is the subject matter of this lawsuit, 13 for the reason she is the owner of no interest whatever in the real estate which is the subject matter of this lawsuit, 14, 15 and 16 of the intervening complaint.

The defendant has no knowledge or information upon which to base a belief as to the truth of paragraphs 8, 9, 10 and 11 of the intervening complaint, and therefore denies the same.

DEFENSE III

The defendant, National Mines Corporation, is the owner of the coal, surface rights and privileges in, upon and underlying the two tracts of land described in the complaint and intervening complaint, the title of which is in dispute herein. The fee simple title in said tracts of land were conveyed by Harry Laviers, Sr., and others, Trustees of Evans-Laviers Real Estate Trust to Western Pocohontas Corporation, by deed dated May 15, 1963, which deed is of record in Deed Book 112, at page 22, Breathitt County Court Records, which tracts are more particularly described in Exhibit A attached hereto which is made a part hereof by reference.

Tract I described in the complaint and intervening complaint is embraced within the lands described in said Exhibit as Exhibit A-1, and Tract II is embraced within the lands described in said Exhibit as A-2 attached hereto.

By Deed of Lease, dated January 1, 1971, Western Pocohontas Corporation leased the coal, surface rights and privileges in the two above described tracts of land to Evanston Coal and Land Company.

Evanston Coal and Land Company thereafter was merged with and made a part of National Mines Corporation, which Company is now the owner of the coal, surface rights and privileges by reason of it's said lease for the purpose of mining the coal in the tracts described herein and in the complaint and intervening complaint.

WHEREFORE, the defendant, National Mines Corporation, demands:

1. the complaint and intervening complaint against it be dismissed and that the plaintiff and intervening plaintiff recover nothing thereby;

2. the defendant be adjudged the owner of the coal, surface rights and privileges to it in and to the two tracts of land described herein and leased to it by Western Pocohontas Corporation; and

3. it recover it's costs and all proper relief to which it may be entitled.

COMBS & COMBS
P.O. Drawer 189
Prestonsburg, Kentucky 41653

(s) Paul C. Combs
Paul C. Combs

I hereby certify that a true and correct copy of the foregoing Answer was this day mailed, postage prepaid, to Mr. Richard L. Fain, Campton, Kentucky, Attorney for Plaintiff, and Mr. J. Fox DeMoisey, 105 South Sherrin Avenue, Louisville, Kentucky 40207, Attorney for Intervenors, this 19 day of April, 1978.

(s) Paul C. Combs
Paul C. Combs
Attorney for National Mines Corporation

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE, - - - - - - *Plaintiff,*

v.

NATIONAL MINES CORPORATION, - - - *Defendant.*

MEMORANDUM OPINION AND ORDER

Filed May 14, 1980

In the above styled action plaintiff asserts ownership to certain lands on which defendant has conducted mining operations. Defendant denied plaintiff's title and asserts that defendant has title to the coal, mineral and surface rights of the land in question. The law is well settled that a plaintiff asserting title has the burden of establishing ownership. In Kentucky this burden can be met in one of three ways: (1) title of record from the Commonwealth; (2) title from a common source; or (3) title by adverse possession. *Marinaro* v. *Deskins,* Ky., 344 S.W.2d 817 (1961). Further, in an action to quiet title, a plaintiff must recover on the strength of his own title and not the weakness of his adversary. *Rose* v. *Griffith,* Ky., 337 S.W.2d 15 (1960).

Here plaintiff has attempted to prove his ownership through title of record from the Commonwealth. Based on the evidence of record and for the reasons discussed below, plaintiff has failed to carry his burden of proof and his claim must be dismissed.

This action was commenced on May 7, 1976, to be tried by the Court without the intervention of a jury. On May 14, 1979 plaintiff's present and fifth attorney in the course of this action, moved the Court to enter his name as plaintiff's counsel of record, for leave to file an amended and supplemental complaint, and for an extension of time in which to complete plaintiff's proof of title. On June 11, 1979, a hearing was held on all pending motions. At that hearing both parties were instructed to file memoranda in support of their positions. At the expiration of the time frame set by the Court, July 3, 1979, the matter was to stand submitted for final determination. Both parties filed their respective briefs within the time frame allowed but no decision was timely forthcoming. Then, on February 4, 1980, plaintiff moved the Court for an oral hearing and for a preliminary injunction and tendered plaintiff's second amended supplemental complaint. Defendant timely objected to these motions and on March 11, 1980 the Court held another hearing on all pending motions at which both parties were heard. The hearing was ordered continued. On March 27, 1980, defendant having consented, the Court granted the preliminary injunction against defendant restraining defendant from entering on or using the lands in issue until the question of ownership was determined. Finally, a hearing on plaintiff's chain of title was held on March 31, 1980 and again the Court heard both parties and again granted them additional time in which to file supporting memoranda. Also at that hearing the Court, with defendant's consent, permitted plaintiff to file those documents which had been mentioned in the record but which, apparently through oversight, had not been filed. Those documents were the two patents from the Commonwealth to the Tottens. At that time plaintiff's counsel also moved to file additional documents in the record in an effort to repair certain defects in his chain of title. Defendant ob-

jected to the admission of these documents since there had been no previous mention of them in the record. Thus, they constituted new matter for filing after the evidence had been closed on July 3, 1979. Accordingly, the Court permitted plaintiff to tender those documents which consisted of death certificates for Leila B. Gunn and Laura Gunn Nicholson, and an affidavit of descent purporting to show the heirs of Laura Gunn Nicholson.[1]

The record clearly reflects that as of July 3, 1979, when the evidence closed, plaintiff had failed to establish title in himself from the Commonwealth of Kentucky. At that benchmark date plaintiff's chain admittedly was fatally defective for lack of filing in the record of either of the patents from the Commonwealth of any evidence that Leila B. Gunn was the same person as Leila J. Bowen, a critical showing necessary to establish the link between the Totten's deed of two tracts to Leila J. Bowen on December 20, 1899, and a conveyance from Leila B. Gunn, widow, to Virginia Gunn Shipley and Laura Gunn Nicholson on December 4, 1951. It is unnecessary to recite other failures in plaintiff's chain of title as of July 3, 1979.

Thus, the issue before the Court on plaintiff's chain of title is largely evidentiary in nature and essentially involves the Court's discretion in determining whether to reopen the record to give plaintiff one more opportunity to prove the title he has failed to prove during the four years this claim has been litigated. Reopening a case for further proof is a matter which addresses itself to the sound discretion of the district court. *Sandusky Foundry & Machine Co.* v. *City of Wickliffe,* 483 F.2d 695 (6th Cir. 1973);

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[1]In the form presented it is concluded that the affidavit of descent does not meet the requirements of probative evidence. The death certificate per se does not establish the required nexus of proof.

Ramsey v. *United Mine Workers of America*, 481 F.2d 742 (6th Cir.), *cert. denied*, 414 U.S. 1067 (1973). Generally, in deciding whether to reopen a case the Court is concerned with several factors: (1) what burden, if any, will be placed on the parties and their witnesses; (2) what undue prejudice may result by not taking new testimony; (3) what consideration should be given to judicial economy. *Rochez Brothers, Inc.* v. *Rhoades*, 527 F.2d 891 (3rd Cir.), *cert. denied*, 425 U.S. 993 (1976).

Plaintiff's chain of title, as asserted, is rather brief and may be represented by the following:

(1) Commonwealth to A. I. Totten
Grant 65181, 6/17/1892
Breathitt County, Order Book 139:117

(2) Commonwealth to Mrs. E. R. Totten
Grant 65798, 7/13/1892
Breathitt County, Ky. Records 118:200

(3) A. I. Totten, et ux to Leila J. Bowen
12/20/1899, two parcels: 165 acres and 130 acres
Source: Commonwealth Patents as above
Breathitt County Records 19:518

(4) Leila G. Gunn, widow, to Virginia Gunn Shipley and Laura Gunn Nicholson

12/4/51 A document, purportedly a deed/trust agreement conveying in trust two specifically described lots in Middlesboro, Ky. with source of title, and a residuary clause conveying in trust "all first party's other real and personal property of every kind and nature wherever situate. . . ." The residuary clause contains no information regarding the real estate conveyed therein — no description, no location, and no source of title.

Breathitt County Record 119:571
Recorded 11/28/69

(5) Virginia Gunn Shipley, et ux, Eugene P. Nicholson, Jr., widower, Eugene P. Nicholson, III, et ux, David C. Nicholson, single, and Jane Nicholson Lupton, et ux to Appollo Company
10/22/74, two tracts: 165 acres and 130 acres
Source: DB 118:200, 117:139, 119:571
Breathitt County Records 127:201
This deed suggests the death of Laura Gunn Nicholson and names heirs at law. Jurat is free act and deed.

(6) Appollo Company to Cecil Gary Noble 9/15/75, two tracts: 165 acres and 130 acres
Breathitt County Records 129:341

There is another deed of record which constitutes a part of the chain of title with which plaintiff must deal although he has not asserted it.

(7) Appollo Company to Carol J. Ash
11/22/76, two tracts: 165 acres and 130 acres
Source: DB 118:200, DB 117:139, DB 127:201
Breathitt County Records: DB 132:602

This deed came to light as a result of the filing of an intervening complaint by Mrs. Carol J. Ash to which a certified copy of said deed was attached as an exhibit. The order permitting the intervention and ordering filed the complaint was made on April 3, 1978. Subsequently, Mrs. Ash was permitted to withdraw from this action after the parties were given time to object to her motion. Upon her judicial admission, presented by counsel, that the defendant had a superior title to the disputed lands Mr. Ash was

permitted to withdraw without objection (see Record Document No. 42).
Rule 41(a)(2) F.R.C.P.

In the plaintiff's description of the body of proof to be adduced by him if the record were reopened, no mention appears of this deed or the circumstances under which it was made. Since this matter had been before the plaintiff since February 6, 1978, the date the intervening complaint was first tendered, and considering the time specifically given for objection to the withdrawal of the intervening action upon the ground that the defendant had a superior title after examination of the circumstances of the case, the existence of the deed and its impact upon the chain of title is chargeable to the plaintiff. Even though the intervening plaintiff was permitted to withdraw from the action, this Court knows of no authority under which it may ignore the existence of the duly recorded deed to Mrs. Ash or upon which the plaintiff may establish a prima facie chain of title without seeking the disposition of the deed as invalid or otherwise removing the cloud engendered by it. Since this matter was not involved in the request to reopen the evidence, any reopening upon the limited grounds sought by plaintiff would not be dispositive of the burden he must carry in proving his own title.

There exist, quite apart from the Ash deed problem, an abundance of evidentiary problems beyond merely admitting the tendered documents into evidence. The need for extrinsic evidence is substantial (see, e.g., footnote 1 supra). It is the conclusion of this Court that reopening the record within the scope described by counsel in the record would not result in plaintiff being able to establish a prima facie chain of title. The other issues present herein include not only identity of persons but also the intent of Mrs. Gunn, the grantor, in the 1951 document, with probabale consequences of other proof outside of that described by plain-

tiff in his request to reopen. *See, Saulsberry* v. *Saulsberry*, 121 F.2d 318, 322 (6th Cir. 1941); *Justice V. Justice*, Ky., 39 S.W.2d 250 (1931). As noted, the Appollo deeds and their circumstances not mentioned in the offer of proof are essential to establishing a chain of title.

It is noted that the evidence which has been tendered to cure gaps in the title chain cover only those deficiencies which were specifically pointed out to plaintiff by the Court as illustrative of the state of the record at the hearing on March 11, 1980 and during a telephone conference call between the Court and the attorneys for the parties. There is not a single benefit ascertainable from the Court's understanding of permitting the record to be reopened — under circumstances where plaintiff announced every matter which he sought to have considered during the reopening — and not dispose of the Ash deed. There is no judicial economy in forever reopening this record. This reasoning applies as well to plaintiff's untimely motions to file second and third amendments to his original pleadings. See, *Conklin* v. *Joseph C. Hofgesang Sand Co., Inc.*, 565 F.2d 405 (6th Cir. 1977).

This Court is well aware of the historical equitable aspects of an action to quiet title and of the strong policy grounds to support the land titles of the Commonwealth where such can be accomplished. In holding that plaintiff has failed to establish his title this Court does not ipse dixit hold that the defendant is the owner of such property: the holding is a narrow one and goes no further than to conclude, as between the parties, that the plaintiff failed to adduce evidence establishing his own title. The record does require the Court to find, upon the judicial admission of Carol J. Ash, that as between Carol J. Ash or those claiming under her and National Mines Corporation, National Mines Corporation has superior title to the disputed lands.

IT IS ORDERED HEREIN AS FOLLOWS:

(1) That plaintiff's motions to file amendments to his original complaint be, and they hereby are, DENIED.

(2) That plaintiff's motion to reopen the record for the taking of new evidence be, and the same hereby is, DENIED.

(3) That plaintiff's complaint be, and the same hereby is, DISMISSED.

(4) That the above styled action be, and the same hereby is, STRICKEN from the docket of this Court.

This the 14th day of May, 1980.

(s) H. David Hermansdorfer
H. David Hermansdorfer, Judge

No. 80-3483

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL GARY NOBLE, - - - *Plaintiff-Appellant*

v.

NATIONAL MINES CORPORATION, - - *Defendant-Appellee*

ORDER—Filed November 10, 1981

Before: KEITH and MERRITT, Circuit Judges; ALDRICH, District Judge*

The plaintiff, Cecil Noble, appeals an adverse judgment in his suit to quiet title to approximately 300 acres of mountainous coal-rich Kentucky property. The defendant denied the plaintiff's claim and asserted ownership of the coal, mineral and surface rights for the land in question. The District Court held that the plaintiff failed to establish a prima facie case of good title within the time allowed for the taking of evidence. The Court also denied the plaintiff's motion to reopen the case for the submission of additional evidence. We conclude that the District Court abused its discretion in refusing to reopen and remand to the District Court with instructions to reopen and permit the submission of additional evidence.

The plaintiff presented evidence to the District Court of a chain of title originating with two patent grants from

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*The Honorable Ann Aldrich, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

the Commonwealth of Kentucky. Two weak links in the chain created an issue of whether the plaintiff made out a prima facie case of good title. First, the plaintiff's proof showed a conveyance of the land in question to Lelia J. Bowen, as grantee, and a subsequent conveyance of land by Lelia B. Gunn as grantor. The plaintiff's proof did not show, however, that Lelia Bowen and Lelia Gunn were the same person. The plaintiff later proffered proof to the District Court that Lelia Gunn was the married name of Lelia Bowen but the Court refused to reopen the case to accept the evidence.

Second, the deed from Lelia Gunn did not specifically describe the land which is the subject of this suit. The plaintiff merely claimed, without proving, that it was transferred in a residuary clause of a deed/trust agreement. The plaintiff offered evidence to the court that Lelia Gunn had not conveyed this property previous to the execution of the deed and that it therefore passed in the residuary clause. Again the court refused to reopen the case to accept the evidence.

The grant or denial of a motion to reopen will not be reversed unless an abuse of discretion is clearly shown. *Skehan* v. *Board of Trustees of Bloomsburg State College*, 590 F.2d 470, 478 (3rd Cir. 1978); *See Sandusky Foundry & Machine Co.* v. *City of Wickliffe*, 483 F.2d 695, 700 (6th Cir. 1973); *Ramsey* v. *United Mine Workers of America*, 481 F.2d 742, 753 (6th Cir. 1973). We believe that this is such a case.

The District Court considered the plaintiff's offer of additional proof to be untimely. While it may have been untimely, we cannot ignore the fact that the offered evidence appears to resolve the obvious defects in the plaintiff's chain of title. Moreover, the District Court can hardly justify its denial of the motion to reopen on the ground of untimeliness. This case lingered in the District Court

for more than four years before the judge ruled that the plaintiff failed to make out a prima facie case. We doubt that a brief reopening of this case is likely to cause any significant additional inconvenience or prejudice to the parties. Furthermore, the judge permitted an intervenor to file a cross claim to the same land after the taking of evidence had been closed to the original parties. He then considered the intervenor's claim against the plaintiff but did not reopen the case for the plaintiff, assuming he would not respond to this issue.

By holding that the District Court abused its discretion in refusing to reopen the case we do not intend to imply that the plaintiff has, therefore, made out a prima facie case of good title. We merely hold that the District Court should have arbitrarily prevented the plaintiff from supplementing his proof.

Accordingly, the judgment of the District Court is reversed and this case remanded for proceedings consistent with this order.

Entered By Order Of The Court

(s) John P. Hehman
Clerk

Attest:

John P. Hehman, Clerk

(s) By Gary McCartty
Deputy Clerk

Issued as Mandate: March 3, 1982
Costs: None

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE, et al. - - - - - *Plaintiffs,*

v.

NATIONAL MINES CORPORATION - - - *Defendant.*

MEMORANDUM OPINION AND ORDER

Filed October 7, 1983

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1. The property in controversy is two tracts in Breathitt County, Kentucky. The dispute arises by reason of overlapping surveys or patents. Plaintiffs' claim to Tract No. 1, is Totten patent 65181, 5/22/93; his claim to Tract No. 2, is Totten patent 65798, 6/26/96. The defendant claims title under two Amyx patents issued by the Commonwealth of Kentucky in 1867, and through a Reid patent issued by the Commonwealth of Kentucky in 1872. The two Amyx patents and the Reid patent embrace the two Totten patents.

2. Both plaintiffs and defendant claim title through patents issued by the Commonwealth of Kentucky. Neither plaintiffs nor defendant claim title from a common source or by adverse possession. There is no evidence to support a claim of title by any party to a common source or by adverse possession.

3. The two Totten patents are invalid because they attempt to appropriate prior patented land, that is, prior patented land embraced by the two Amyx and the Reid patents.

4. There is an apparent missing link in plaintiff's chain of title, notwithstanding the admission of additional evidence by reason of the mandate of the Sixth Circuit Court of Appeals. Plaintiff was a member of a partnership, Apollo Company. Contrary to the partnership agreement, plaintiff executed and delivered a deed from Apollo Company to himself. His attempt to do so was unauthorized and invalid.

5. The evidence for the defendant shows and the Court finds that the two Amyx patents and the Reid patent, all senior to the Totten patents, embrace the land in controversy, and by an unbroken chain of instruments filed in evidence vested title to the coal, mining rights and privileges in controversy in the defendant.

6. The burden of proving title rests upon the plaintiff. *Stewart Lumber Company* v. *Fields*, Ky., 445 S.W.2d 140 (1969); *Brumley* v. *Brumley*, Ky., 379 S.W.2d 243 (1964); *Kephart* v. *Rucker*, Ky., 379 S.W.2d 244 (1964); *Coleman Mining Co.*, v. *McClanahan*, Ky., 237 S.W.2d 543 (1951); *Hunt* v. *Cassity*, 297 Ky. 716, 181 S.W.2d 248 (1944).

7. A patent which attempts to appropriate prior patented land is void to the extent that it embraces land previously patented. KRS 56.190; *Mullins* v. *Robinson*, 210 Ky. 461, 276 S.W. 156 (1925); *Nolen* v. *Hall*, 26 KLR 773,82 S.W. 418 (1904); *Terry* v. *Johnson*, 96 Ky. 95, 16 KLR 307, 27 S.W. 984 (1894); *Phillips* v. *Alma Coal Co.*, 7 F.2d 42 (6th Cir. 1925), *cert. denied*, 271 U.S. 669, 46 S.Ct. 483, 70 L.Ed. 1142.

8. The attempt by Noble to convey partnership land to himself for his own benefit was unauthorized and invalid. *Smith* v. *Hall*, 217 Ky. 615, 290 S.W. 480 (1927).

9. The evidence of the defendant, showing an unbroken chain of title from the Commonwealth of Kentucky to the defendant, established title to the lands in controversy in the defendant. *Noland* v. *Wise*, Ky., 259 S.W.2d 46 (1953).

10. The plaintiff has failed to meet his burden of proof and his motion for a summary judgment upon the issue of liability is *DENIED*. The defendant has established title to the land in controversy in the defendant; its motion for summary judgment is *GRANTED*. The complaint of the plaintiff shall be finally dismissed and judgment entered determining that the defendant is the owner by lease of the lands, coal and mining rights in controversy.

This 7th day of October, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE, et al. - - - - - *Plaintiffs,*

v.

NATIONAL MINES CORPORATION - - - *Defendant.*

JUDGMENT—October 7, 1983

Pursuant to a Memorandum Opinion and Order containing a Findings of Fact and Conclusions of Law, it is accordingly

ORDERED, DECREED AND ADJUDGED:

1. The plaintiff's complaint as amended is finally DISMISSED wth prejudice, and plaintiff shall recover nothing thereby;

2. The defendant is determined to be the owner by lease of the property in controversy;

3. Defendant shall recover its costs and this cause is STRICKEN from the docket.

This 7th day of October, 1983.

(s) G. Wix Unthank
G. Wix Unthank, Judge

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-5163

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CECIL G. NOBLE, - - - - - *Plaintiff-Appellant,*

v.

NATIONAL MINES CORPORATION, - - *Defendant-Appellee.*

On Appeal from the United States District Court for the Eastern District of Kentucky

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Decided and Filed October 4, 1985

Before: MERRITT and MILBURN, Circuit Judges; and PECK, Senior Circuit Judge.

MERRITT, Circuit Judge. This appeal represents the most recent stage in a protracted dispute over the ownership of two tracts of land in Kentucky. The litigation, which is now before this Court for the second time, began in 1976, when plaintiff Noble brought suit against defendant National Mines Corporation to quiet title to the land, to enjoin National from interfering with Noble's use of it, and to recover damages as a result of National's use of the property. The current appeal is from summary judgment granted the defendant by the United States District Court for the Eastern District of Kentucky. We reverse the District Court and remand for proceedings consistent with this opinion.

I.

The disputed land lies in a mountainous, sparsely populated region of eastern Kentucky. It contains coal reserves. No one lives on the land or is in actual possession of it, but both defendant and plaintiff claim it under chains of title originating with grants from the Commonwealth of Kentucky. Defendant claims under three separate patents issued by the Commonwealth: two in 1867 to M. J. Amyx and one in 1872 to Stephen G. Reid. Plaintiff claims under two separate patents, issued in 1892, to A. I. Totten and E. R. Totten, respectively.

Noble acquired his interest in the disputed land in 1975 from the partnership of which he was a member. The conveyance was executed in the name of the partnership by Noble himself. After the conveyance, Noble attempted to lease the property for coal mining, but was unsuccessful, as National was already engaged in mining operations on the property. Noble then brought the present action in 1976 to quiet his title to the property, to enjoin National from further mining operations, and to recover damages for the value of the coal National had extracted. In May 1980, the District Court dismissed the action on the ground that Noble had failed to prove his title to the property, after denying Noble permission to submit new evidence on this question. The Court expressly withheld judgment on the issue whether defendant was the owner of the land. In *Noble* v. *National Mines Corp.*, No. 80-3483 (Nov. 10, 1981) (unpublished per curiam order), we reversed, holding that the trial court had abused its discretion by not allowing Noble to submit the new evidence.

After further proceedings, the case once more came to the District Court for decision on cross-motions for summary judgment on October 7, 1983. The Court found for National, holding that plaintiff had again failed to estab-

lish his claim of title because (1) Noble's conveyance of the partnership property to himself was void, and (2) National's chain of title was superior to Noble's chain. The Court also held that the defendant's patents "embraced the land in controversy" and determined the defendant "to be the owner by lease of the property in controversy." District Court Memorandum Opinion and Order, JA 227; District Court Judgment JA 229.

II.

The burden of proving title to the disputed property rests on Noble as plaintiff. *See, e.g., Stewart Lumber Co.* v. *Fields*, 445 S.W.2d 140 (Ky. 1969); *Coleman Mining Co.* v. *McClanahan*, 237 S.W.2d 543 (Ky. 1951). If Noble is unable to demonstrate valid title to the property, any defects in National's chain of title are irrelevant.

The trial court held that Noble's conveyance of the partnership's interest in the disputed land was void. Thus, in the District Court's view, the deed under which Noble claims title is a mere nullity, totally without legal force and effect, and incapable of ratification. For this proposition, the Court relies on *Smith* v. *Hall*, 217 Ky. 615, 290 S.W. 480 (1927), a case stating the well-settled principle that a partner without actual authority cannot bind the partnership unless he or she acts within the scope of the usual partnership business. *Id.* at 482. A corollary of this principle is that an act of a partner without actual authority or in contravention of an express restriction on authority does not bind the partnership to persons having knowledge of the restriction. Both of these principles are currently codified in section 362.190(1) and (4) of the Kentucky Uniform Partnership Act.

Assuming *arguendo* that the partnership was still in effect at the time of the challenged transaction, and that Noble acted contrary to a restriction on his authority, this

does not render the deed a legal nullity from its inception. Neither *Smith* v. *Hall, supra,* nor the Uniform Partnership Act dictate this result. Proper analysis suggests that, although the deed may be voidable by the partnership, it is not a legal nullity, incapable of ratification.

Under K.R.S. 362.195(1), "any partner may convey title to [partnership] property by a conveyance executed in the partnership name. . . ."[1] This section directly addresses real property transactions; it provides the correct analystical starting point in this case.

The plain language of section 362.195(1) provides that, if the conveyance is executed in the partnership name, *any* partner may convey real property for the partnership. Thus, as a threshold matter, the statute does not prohibit a partner without actual authority from conveying real property.[2]

There are instances in which the transaction can be stripped of its legal effect, or in other words, avoided. Within the same section, it is provided that "the partner-

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[1]K.R.S. 362.195(1) provides in full:

> (1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of KRS 362.190(1) or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

[2]In different factual circumstances, state courts have applied different sections of the Uniform Partnership Act to hold that certain property transactions were void. *See, e.g., Ditzel* v. *Kent,* 131 Mont. 129, 308 P.2d 628 (1957); *Windom National Bank* v. *Klein,* 91 Minn. 447, 254 N.W. 602 (1934). These cases are not relevant to Noble's transaction, which was executed in the name of the partnership and is clearly controlled by 362.195(1).

ship may recover such property" given certain conditions. The statute's exception simply provides that the partnership "may recover" the property; this provision contemplates that the partnership can take affirmative action to negate the transaction.

That a transaction can be rescinded or avoided does not mean that it was void in the first instance. In fact, just the opposite is true. If the transaction is void from its inception, no formal action is required to negate it, since a void transaction has no legal force or effect.[3]

In order for the statute to make sense, then, the language clearly contemplates that a real property transaction, effected even by one without actual authority, is not void. Section 362.195(1) clearly provides the transfer here with legal force and effect.

Nor does section 362.190(4) direct a different result.[4] That section simply says that, as a general proposition, the partnership is not bound by partners who act contrary to a restriction on their authority when the parties dealing with the partner had knowledge of the restriction. This section codifies a basic tenet of partnership common law, designed to protect the interests of the partnership entity as against those who deal knowledgeably with its partners. *See* Restatement (Second) of Agency § 166 (1958); H. Reuschlein & W. Gregory, Agency and Partnership 289 (1979); *see also Cox* v. *Pabst Brewing Co.*, 128 F.2d 468 (10th Cir. 1942). In no way does this section mandate that

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[3]Further, unlike voidable transactions, void transactions cannot be ratified. *See, e.g., Ridgely* v. *First National Bank*, 75 F. 808, 810 (10th Cir. 1896).

[4]K.R.S. 362.190(4) provides:

> No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

a transaction is *void* when a partner acts contrary to a restriction on his or her authority. It simply protects the partnership by providing that the entity is not bound by that act.

The reason for this rule is that partnerships often act informally based on unwritten tacit understandings. That is in part what Noble claims happened here, and no partner has come forward to dispute his claim.

There are cases in which, for strong public policy reasons, a property transaction should be deemed void from its inception. Traditional common law principles support the view that when there is fraud in the execution of the instrument, "as where it has been misread, or some other fraud or imposition has been practiced upon the party in procuring his signature and seal," *Hartshorn* v. *Day*, 60 U.S. 211, 223 (1856), the deed is void.

The record does not support the conclusion that Noble's transaction was fraudulent. The deed transfer occurred after Noble had appeared in court to formally dissolve the partnership. He argues that his action was appropriate to the "winding up" phase of the partnership's dissolution. Although it is open to the former partners to challenge Noble's transaction, no credible case of fraud in the execution is supported by the record in this case.

In addition to common law definitions of void transactions, some statutes provide that certain property transactions are void. In *Altemus* v. *Nichols*, 115 Ky. 506, 74 S.W. 221 (1903), the Kentucky Court of Appeals applied a statute which declared null and void any property transfers made while another has adverse possession of the land conveyed. *Id.* at 222. Citing the "peace of society and the repose of occupants" as the statute's guiding purpose, the court held that the challenged deed was "absolutely ineffectual for every and any purpose." *Id.*

The controlling statute in this case authorizes, rather than prohibits, the challenged transaction. A legislative intent to render an unauthorized partnership transaction null and void could have been expressed clearly. Further, no sensible policy is served by a rule that an unauthorized partnership real property conveyance is void because the partners dealt contrary to an express restriction on authority with parties who had knowledge of the restriction. The goal of that principle is to protect the entity against claims of third parties who deal knowledgeably with individual partners. That goal is well-served by affording the partnership a basis for asserting its own rights. To hold that an unauthorized real property transaction is void because of K.R.S. 362.190(4) is simply to increase uncertainty in property transactions for no good purpose.

Because K.R.S. 362.195(1) enables rather than prohibits the challenged action here, and because no strong public policy is served by declaring this transaction void from its inception, we reverse the District Court's holding on tho issue of plaintiff's chain of title.

III.

Noble also argues on appeal that the District Court erred in refusing to re-open the record for the introduction of evidence by plaintiff's registered engineer. This evidence purportedly addresses the location of one of the disputed tracts of land; Noble maintains that the testimony will prove that defendant's positioning of one of the tracts of remote mountain land is inaccurate by one thousand feet. The import of this evidence is to show, contrary to the District Court's finding, that the senior Amyx patent does not totally embrace the Totten patent.

The engineer's evidence is not presently of record since, on the day set for his deposition, he mistakenly went to the

wrong law offices in Eastern Kentucky, and therefore, failed to give his deposition. This occurred on the last day allotted for the taking of plaintiff's evidence in this trial by deposition. Noble has made several motions since 1978 to re-open the record to include this proof; each of these motions has been denied.

As we observed in our first opinion in this case, the decision to re-open the record is one committed to the sound discretion of the trial court, and will be overturned on appeal only for an abuse of discretion. *See Skehan* v. *Board of Trustees of Bloomsburg State College,* 590 F.2d 470, 478 (3rd Cir. 1978); *Sandusky Foundry & Machine Co.* v.*City of Wickliffe,* 483 F.2d 695, 700 (6th Cir. 1973); *Ramsey* v. *United Mine Workers of America,* 481 F.2d 742, 753 (6th Cir. 1973).

Pursuant to this Court's instructions on remand,[5] the District Court reopened the record to include evidence concerning two alleged weaknesses in plaintiff's chain of title. Upon motion by the defendant, however, and, as noted by the defendant in tendering the motion, consistent with the spirit of our first decision, the District Court also opened the record to include a document strengthening defendant's chain of title. The Court also opened the record to admit evidence relevant to the issue of Noble's authority to transfer real property for the partnership.

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[5]In that decision we stated:

> The District Court held that the plaintiff failed to establish a prima facie case of good title within the time allowed for the taking of evidence. The Court also denied the plaintiff's motion to reopen the case for the submission of additional evidence. We conclude that the District Court abused its discretion in refusing to reopen and remand to the District Court with instructions to reopen and permit the submission of additional evidence.

Noble v. *National Mines Corp.*, No. 80-3483 (Nov. 10, 1981).

The District Court clearly did not interpret a law of the case doctrine narrowly to preclude opening the record for evidence which helped defendant, although the evidence was not specifically enumerated in our prior decision. The Court below correctly did not limit itself to opening the record for only two pieces of evidence but rather, exercised its discretion to assemble before it necessary proof to resolve tihs protracted litigation.

There is a public interest in resolving claims of title concerning Kentucky's remote and largely unpopulated mountain lands. The Kentucky Court of Appeals implicitly recognized this in 1940 when, in a dispute concerning different patents from those at issue here, it chronicled the rampant confusion that had marked eighteenth and nineteenth century land holdings in the state. *Warfield National Gas Co.* v. *Ward,* 286 Ky. 73, 149 S.W.2d 705 (1940). We were apprised at oral argument that some measure of this confusion has survived into the present in relation to remote areas where there has been no influx of population.

Plaintiff seeks to prove a discrepancy in defendant's plotting of the tract at issue. This issue goes, not to the literal chain of title of either party, but to the positioning of the tracts at issue. Without at least considering this evidence, the validity of the relevant patents cannot be determined accurately.

The District Court, both in the first and second dispositions in this case, ruled that plaintiff's chain of title was invalid. Thus, the actual positioning of the tracts was irrelevant. To the extent that a refusal to re-open the record was predicated by either Court on the theory that plaintiff could not prove title in any case,[6] that reason no longer

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[6]The District Court in the first proceeding bifurcated the disposition of the issues such that it only considered evidence on

(Continued on next page.)

exists; by virtue of our disposition of the partnership deed issue, plaintiff's chain of title has not failed as a threshold matter. Thus, evidence concerning the actual position of this remote mountain land is highly relevant. On remand, the District Court should re-open the record to allow proof on this issue.

Accordingly, the judgment of the District Court is reversed and remanded for proceedings consistent with this opinion.

(Continued from preceding page.)

plaintiff's literal chain of title. Assuming it had upheld plaintiff's chain, the issues of defendant's chain of title and the assessment of damages would then have come into play. Given this method of structuring the case, it cannot fairly be said that plaintiff waived his right to raise the issue of the boundary discrepancy by not raising it in the first appeal, which was concerned solely with the District Court's analysis of plaintiff's chain of title.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE - - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

FIFTH AMENDED AND SUPPLEMENTAL COMPLAINT—Filed January 9, 1986

Comes the Plaintiff, Cecil G. Noble, and for his Fifth Amended and Supplemental Complaint herein states:

1. He reiterates and affirms all allegations of his original complaint.

2. During the years 1974 and 1975, Defendant wrongfully mined coal from the real estate involved in this action.

3. The mining of such coal resulted in damage to Plaintiff in the sum of at least $65,000,000.00.

4. Such coal mining was done by Defendant in bad faith through willful trespass and conversion with gross disregard for the rights of Plaintiff making Defendant liable in damages to Plaintiff for the enhanced value of the coal when and where converted without deductions of expenses incurred or labor employed and making Defendant liable also for punitive and exemplary damages.

5. In the alternative such coal mining was done by Defendant inadvertently or under a claim of right or a bona fide belief of title making Defendant liable in damages to

Plaintiff only for the coal removed based upon its value in situ.

6. Plaintiff did not discover the facts regarding removal of coal by Defendant from the real property involved herein until after the filing of the complaint herein or until approximately November, 1977.

7. Defendant intentionally concealed the facts regarding removal by Defendant of coal from the real property involved herein.

8. The Defendant, National Mines Corporation, and/or its agents, servants and/or employees have during the pendency of this action repeatedly trespassed and entered upon the real estate owned by Plaintiff herein, which is the subject of the present action. Such entries and trespasses being done by Defendant, National Mines Corporation and/or its agents, servants and/or employees in bad faith through willfulltrespass and conversion with gross disregard for the rights of Plaintiff make such Defendant liable in damages to Plaintiff for the enhanced value of the coal when and where converted without deductions of expenses incurred or labor employed and make Defendant liable also for punitive or exemplary damages.

9. The nature of the trespassing has been trespass with bulldozers and equipment, removing timber and removing earthen materials, cutting roads, spreading rock, stockpiling rock, facing coal, and preparing for drilling and dynamiting, drilling and dynamiting, coal mining and removal of coal.

10. In the alternative such trespasses have been done and are being done by Defendant, National Mines Corporation and/or its agents, servants and/or employees, inadvertantly or under a claim of right or a bona fide belief of title making Defendant liable in damages to Plaintiff as regarding any coal removal only for the coal actually removed based upon its value in situ.

11. The compensatory damage resulting to Plaintiff through the trespass and conversion by the Defendant, National Mines Corporation and/or its agents, servants and/or employees, during the pendency of this action as hereinabove set out is at least the sum of $75,000,000.00.

WHEREFORE, Plaintiff demands:

1. Judgment against the Defendant National Mines Corporation in the sum of $100,000.00 for preventing Plaintiff's use of his property which is the subject of this action by setting up claims to such property hostile and adverse to Plaintiff's owership thereof by words and actions thereby casting a cloud upon Plaintiff's title.

2. Judgment against the Defendant National Mines Corporation for additional compensatory damages for trespass and removal of coal from Plaintiff's property which is the subject of this action prior to the filing of the present action in the additional sum of $65,000,000.00.

3. Judgment against the Defendant National Mines Corporation for additional compensatory damages for trespass and conversion and removal of coal during the pendency of the present action in the additional sum of $75,000,000.00

4. Judgment against the Defendant National Mines Corporation for punitive or exemplary damages in the additional sum of $50,000,000.00.

5. Interest from date of judgment at the rate of 12% per annum.

6. Trial by jury of all issues properly so triable.

7. Plaintiff's costs herein expended.

8. All other proper relief.

(s) Ben B. Hardy
Ben B. Hardy
Hardy & Hardy, Attorneys
209 South Fifth Street
Louisville, Ky 40202
(50) 587-6621
Counsel for Plaintiff

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE - - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

ANSWER TO FIFTH AMENDED COMPLAINT

Filed January 17, 1986

The defendant denies each and every allegation of the Fifth Amended Complaint and all allegations of all pleadings of plaintiff not herein expressly admitted.

WHEREFORE, defendant demands as in previous pleadings, demands that the Fifth Amended Complaint be dismissed and plaintiff recover nothing thereby, and further demands its costs and all proper relief.

(s) C. Kilmer Combs
C. Kilmer Combs
Wyatt, Tarrant & Combs
1100 Kincaid Towers
Lexington, Kentucky 40507
(606) 233-2012
Attorney For Defendant

CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing has been mailed, postage prepaid, to:

Hon. Ben B. Hardy
Hardy & Hardy
209 South Fifth Street
Louisville, Kentucky 40202

this 17th day of January, 1986.

(s) Jeffrey N. Quinn for
C. Kilmer Combs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
AT PIKEVILLE

Civil Action No. 76-370

CECIL GARY NOBLE, et al. - - - - - *Plaintiffs*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

AMENDED ANSWER TO CURRENT COMPLAINT

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1. The Answer to the Fifth Amended Complaint is adopted by reference and for further defense states as follows.

2. The Stephen G. Reid Patent No. 47173, containing 129,000 acres, issued June 15, 1872, is a vaild patent and was judicially determined to be valid and binding on the Commonwealth of Kentucky in the action commenced in the Franklin Circuit Court by Stephen G. Reid against the Register of the Commonwealth of Kentucky, later appealed to the Court of Appeals of Kentucky in an appeal styled *Register* v. *Reid*, 9 Bush 102 (1872).

3. The action in the Franklin Circuit Court was a mandamus action to compel the Register, a statutory officer of the Commonwealth of Kentucky, to perform his duty for and on behalf of the Commonwealth of Kentucky by issuing to Stephen G. Reid the patent here in controversy based upon multiple surveys of 200 acres each obtained by Stephen G. Reid. The surveys there in issue are the same

surveys upon which the subject patent was based and issued.

4. The Franklin Circuit Court mandamused the Register to issue the subject patent, but the Attorney General of the Commonwealth of Kentucky appealed the case to Kentucky's highest court, the then Court of Appeals of Kentucky. That court affirmed the judgment of the Franklin Circuit Court and required the Register to honor the surveys and issue the subject patent.

5. The defendant National Mines Corporation is a successor in interest claiming under the Stephen G. Reid patent. The defendant obtained title to the Stephen G. Reid patent by mesne conveyances and documents.

6. The plaintiff Noble claims title as a successor to the Commonwealth of Kentucky after the decision in *Reid* v. *Register, supra,* and after the issuance of the Stephen G. Reid Patent No. 47173 on June 15, 1872. The patents under which the plaintiff claims are patents issued by the Commonwealth of Kentucky to A. J. Totten, Patent No. 65181, dated May 22, 1893, and to E. R. Totten, Patent No. 65798, dated June 26, 1896. The plaintiff, claiming title under grants from the Commonwealth of Kentucky subsequent to the decision in *Register* v. *Reid* and the issuance of the Reid patent, are judicially estopped and barred by the doctrine of res judicata from asserting any invalidity on the part of the Stephen G. Reid Patent No. 47173.

WHEREFORE, defendant continues to demand that the Complaint as amended be finally dismissed and plaintiff recover nothing thereby, its costs and all proper relief.

(s) C. Kilmer Combs
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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE - - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

MEMORANDUM OPINION—Filed August 10, 1990

The plaintiff, Cecil G. Noble [Noble], filed this action in 1976 against National Mines Corporation [National] seeking to quiet title to some 300 acres of property in Breathitt County, Kentucky, to enjoin National from using the property, and to recover nearly two hundred million dollars in damages resulting from use of the property by the defendant. To call this matter "protracted" understates the case. The plaintiff's claim to title has twice been rejected by district judges of this court, both of which rulings were overturned by the United States Court of Appeals for the Sixth Circuit. The case has been reopened and further evidence accepted in accord with the most recent appellate opinion. *Noble* v. *National Mines Corporation*, 774 F.2d 144 (6th Cir. 1985). The issues have been fully briefed and the matter is now ripe for decision on trial by deposition. [Record No. 187].[1]

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[1]The cause has been bifurcated, with the issue of damages, if any, to be later resolved.

In the two prior district court opinions, it was found that the paper chain of title from the Commonwealth to Noble had not been proven. The Sixth Circuit, by its latest opinion, has finally resolved the fact that the various links in Noble's title from the Kentucky land patents to his present deed are intact. There remains, however, an issue as to the validity of the patents under which Noble claims title to the subject poperty. The Sixth Circuit further directed this court to re-open the case as to evidence on the positioning of the competing tracts. *Noble*, 774 F.2d at 149-150. Substantial evidence in this regard has now been incorporated into the record through videotape dispositions and the briefs of the parties. The record is now sufficiently complete to attempt a final resolution of this dispute.

Noble claims title to two tracts of property located on the Wolf Pen Branch in Breathitt County. His purported chain of title stems from two Kentucky land grants: (1) the A. I. Totten patent, No. 65181, issued July 13, 1892 (the uper Totten tract); and (2) the E.R. Totten patent, No. 65798, issued June 26, 1896 (the lower Totten tract).[2] [Plaintiff's Exhibits 101 and 103 (copies of the patents); Plaintiff's Exhibits 104 and 156 (maps indicating the plaintiff's version of the patent boundaries)].

National believes the property to which these Totten patents refer was entirely granted by preceding patents, thus voiding the conveyance attempted by the Totten patents under Kentucky law. KRS 56.190; Kentucky General Statutes, Ch. 127, section 4704 [Record No. 189, Exhibit 2]; *see also Phillips* v. *Alma Coal Co.*, 7 F.2d 42, 43 (6th Cir. 1925), *cert. denied*, 271 U.S. 669 (1926). These

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[2]The two tracts are referred to as "upper" and "lower" in accord with the location of the tracts along Wolf Pen Branch in that one lies higher up the branch than the other.

pre-existing patents are: (1) eight patents to M.J. Amyx, issued at various times in 1987, Nos. 38830, 38832, 38829, 38828, 38834, 38827, 40628, and 40629; and (2) the Stephen G. Reid patent, No. 47113, issued February 17, 1872. [Defendant's Exhibits 61 and 68 (maps indicating defendant's version of boundaries)].

The parties have hotly disputed which of them is to bear the burden of proof at this juncture. Thus, the court must first resolve this issue. The critical point here is that National does not claim any affirmative relief as to its title to this property.[3] It does not ask for a declaration by this court that its title is valid. Noble repeatedly argues in his pleadings that National has not proven its chain of title and that chain's "superiority". In the posture of this case, the court finds that National does not bear this burden.

Both parties acknowledge that "[t]he burden of proving title to the disputed property rests on Noble as plaintiff." *Noble*, 774 F.2d at 146. The plaintiff, however, believes this burden is satisfied by the fact that he has proven a paper chain of title from the Totten patents to the present time. Noble claims that the burden now shifts to National to prove the superiority of its title.

This contention misses that fact that National has carried its burden of coming forward with yet another factor undermining the plaintiff's paper chain of title, *i.e.*, the invalidity of the Totten patents. The plaintiff seeks to establish ownership by "title from the Commonwealth". *Marinaro* v. *Deskins*, 344 S.W.2d 817, 819 (Ky. 1961) (trespass); *Noland* v. *Wise*, 259 S.W.2d 46, 48 (Ky. 1953) (quiet title). Just as the partnership conveyance and the Lelia Bowen/Gunn discrepancy were alleged to be weak links in the chain of title, no valid title from the Commonwealth

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[3]It should be noted that National is simply a leaseholder occupying the property for coal mining purposes.

can be vested in the plaintiff if the land patents supposedly forming its base are void.

National has come forward with evidence of Kentucky patents preexisting the plaintiff's Totten patents. Noble bears the burden of proving that the alleged patents are not valid and/or that they do not encompass some portion, if not all, of the Totten patents. Accordingly, it is unnecessary for the court to consider the defendant's title or to pass upon its rights until the plaintiff has satisfied this burden. *Oney* v. *Lovely*, 152 S.W. 785, 786 (Ky. 1913); *Nolen* v. *Hall*, 82 S.W. 418, 419 (Ky. 1904).

The plaintiff first attacks the validity of the Reid and Amyx patents by alleging actual possession of the subject property from 1845 to at least 1890, evidenced by a series of four deeds executed during a time period in which the patent owners allegedly did not interrupt possession. [Plaintiff's Exhibit Nos. 148-155 (copies of the deeds)]. Kentucky courts have held that the issuance of a patent does not, by itself, oust persons on the subject property from possession without actual entry by the patentee. *Buckner's Ex'r* v. *Kirkland's Ex'r.*, 110 S.W. 399 (Ky. 1908) (involving an Amyx patent); *Whitley County Land Co.* v. *Powers' Heirs*, 144 S.W. 2d 2, 5-6 (Ky. 1912).

The plaintiff urges that these deeds (referred to as the "Tevis" chain of title by virtue of the name of the last grantee in the chain) show that persons had retained possession of the subject property[4] before and after the patents. He further avers that there is no evidence these holders were ousted by Reid or Amyx. Thus, *Buckner's Ex'r* would give rise to a presumption of grant from the Commonwealth, invalidating the conflicting portion of the Amyx and Reid patents.

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[4]The defendant does not contest the fact that the property purportedly conveyed by these deeds includes the subject's tracts.

The problem with the Tevis chain of title is that, as stated by the defendants, the chain "started nowhere and it ended nowhere". The title did not emanate from the Commonwealth and it vanishes after 1890. The plaintiff does not claim any rights through this chain of title. He offers it merely to raise the specter of some potential, but unproven, possession of the subject property during the time of the Amyx and Reid patents which supposedly ripened into actual ownership after fifty years.

Noble does not explain why such vested ownership would not also invalidate the Totten patents. It clearly appears that the Tevis title would have this effect. Regardless, the Tevis chain is simply a loose thread unconnected to any present claim of right or legal basis. Its mere unexplained existence does not, on this record, void the Amyx, Reid, or Totten patents. It is also noteworthy that the Breathitt Circuit Court invalidated Tevis' claim to property on Wolfe Pen Branch encompassed by other patents. [Record No. 175, Defendant's Appendix B]. Although this action is not shown to have involved the same property as in issue here, the disposition may explain the absence of any later conveyances in the Tevis chain.

The Tevis chain of title is Noble's only express challenge to the validity of the Amyx and Reid patents. Despite the plaintiff's allusion to the contrary, the general validity of the Reid patent has been consistently recognized. *Taylor & Crate* v. *Breathitt Coal, Iron and Lumber Co.*, 185 F. 854 (E.D. Ky. 1911); *Breathitt Coal, Iron & Timber Co.* v. *Strong*, 51 S.W. 189 (1899). The next level of analysis involves determining how much of the Totten patents is included within the boundaries of the Reid and Amyx patents. This point has produced disputes between the parties in locating the proper boundaries of the tracts with 19th century descriptions and methods of surveying.

It has clearly been an expensive and time-consuming task for the parties.

The defendant's position is fairly simple. The eight Amyx patents cover portions of the Totten tracts and the other sections, regardless of the exact boundary, are covered by the Reid patent. The Reid patent is a huge grant covering over 150,000 acres, unquestionably encompassing the subject property. However, the patent excludes 25,800 acres of previously "patented or otherwise appropriated land". This gap prevents the Reid patent, on its face, from voiding the Totten patents. It further raises the question of what property within the subject area fall within that exclusion.

National contends that, as to this property, only the Amyx patents preexist the Reid grant. The plaintiff, on the other hand, believes that the Amyx patent boundaries shown by the defendant are significantly erroneous. However, if Noble cannot overcome the scope of the Reid patent, the specific location of the Amyx patents is irrelevant.

The defendant undertook a substantial effort, particularly evidenced through the testimony of engineers Frank Gaddy [Gaddy] and John Praskwiecz [Praskwiecz], to identify any preexisting patents or "other appropriations" affecting the subject tracts. Praskwiecz performed an exhaustive search of patents, grants, surveys, court records in prior Reid patent litigation, and state land records involving the subject property within the Wolf Pen Branch watershed. [Praskwiecz Deposition 15, 19-22]. His research included potential conflicting patents suggested by Ewing Hardy, the title abstractor for Noble. [Praskwiecz Depo. at 18]. The patents located by this search were plotted to indicate their location in regard to the Reid patent. [Defendant's Exhibits 61 and 68].

National concludes from this search that there were no preexisting patents on "other appropriations" of the subject

lands prior to the Reid patent, except for the Amyx patent. The plaintiff makes much of the fact that, throughout lawsuits involving the Reid patent and the course of the defendant's research, varying numbers of preexisting patents and other appropriations have surfaced. In fact, the number located was changed by the defendants during the course of this case. Noble cites this inconsistency as evidence that the defendant's Reid patent search is unreliable.

The defendant is not required to prove the nonexistence of prior appropriations beyond a reasonable doubt. "It is sufficient, at least, if [it has] made it out with reasonable certainty". *Taylor & Crate* v. *Breathitt Coal, Iron and Lumber Co.*, 185 Fed. 854, 857 (E.D. Ky. 1911). The court there found the defendant's research of the Reid patent to have satisfied this standard. Gaddy and Praskwiecz followed the example of the surveyor in *Taylor*, performing substantially similar acts. *Id.*

Similar to Noble, the plaintiff in *Taylor* questioned the defendant's research. Judge Cochran, the first judge to sit on the bench for the Eastern District of Kentucky, conceded the possibility that some prior appropriation may have been overlooked. Citing the extensive work done by the defendant's surveyor, Judge Cochran rejected the plaintiff's argument. The wrote, "In particular, at least, it has not been shown this his [the surveyor's] testimony is incorrect." *Taylor*, 185 F. at 857.

The "possibility" of unlocated patents is borne out in this action. Nonetheless, this court is compelled by the record to follow the conclusion of Judge Cochran. Noble has failed to show evidence of any prior appropriation in the subject area not identified by the defendant, nor are there evident flaws in the research of the defendant's experts. Their testimony is sufficient to satisfy the "reasonable certainty" test of *Taylor*. There are, for the purposes

of this action, no other applicable exclusion from the Reid patent.

The plaintiff takes issue with the plotting and overlap of the Amyx, Reid, and Totten patents, arguing that the defendant has not proven the lack of prior appropriations to parts of the Reid patent outside of Wolf Pen Branch. Based on the record as developed, the court accepts the defendant's version of how the patent properties overlap and finds, again, that the research of the Reid patent was sufficient.

It is obvious that discrepancies in these ancient property descriptions were difficult to resolve. In fact, the experts relied upon by the parties evidence the ease with which a difference of professional opinion may result in such circumstances. While Noble's expert engineer, George T. Cummins, stuck with the metes and bounds descriptions in the various documents [Deposition of George T. Cummins, August 8, 1986, at 103], Praskwiecz and Gaddy compared those calls with the natural monuments referred to in the documents [Gaddy Depo. at 66]. Kentucky law declares permanent natural monuments, such as the ridge lines, to control over all other means of describing tracts of land. *See, e.g., Elkhorn Coal Corp.* v. *Anderson Coal Co.*, 223 F.Supp. 746, 749 (E.D. Ky. 1963) (citing *Kenmont Coal Co.* v. *Combs*, 48 S.W.2d 9 (1932)).

Prior litigation closer in time to these patents serves to further bolster the defendant's version. In *O.H. Swango* v. *Kentucky Coal & Timber Dev. Co.*,[5] the court had occasion to determine the surveyed corners o fthe Amyx patents in issue here [Defendant's Exhibit 29 (copy of the Breathitt Circuit Court record)]. Testimony in that case came from engineers and surveyors who traversed the subject tracts

[5]255 S.W. 114 (Ky. 1922) (published opinion prior to remand for consideration, in part, of the boundary line dispute).

and observed the natural markings, such as trees, which are no longer available. The evidence was used by the defendant's engineers to assist in plotting of the patent lines. Noble's engineer, though admitting such findings are relevant [Cummins Depo., August 18, 1986, at 163-65], did not utilize the surveyor's conclusions in *Swango*. [Cummins Depo., May 12, 1986, at 82-84].

The primary conclusion in *Swango* relevant to this case was that the beginning point for Amyx patent 38834 is "on a high knob in the head of Sugar Camp Branch." The plaintiff makes much of the fact that the deeds in National's chain of title continued the reference to Steep Bank Branch found to be incorrect in *Swango*. Noble, thus, claims National never took title to any property beginning at Sugar Camp Branch. As earlier decided, the status of Noble's title is not relevant here. Rather, the important factor in regard to the validity of the Totten patents is that the true beginning point of the Amyx patent 38834 belongs at Sugar Camp Branch. The conclusions of National's experts are supported by substantial evidence and are consistent with Kentucky law. Their positioning of the subjects tracts must be relied upon by the court.

The result of the foregoing analysis is that this court finds the plaintiff's Totten patents to be invalid as they were issued subsequent to the Amyx and Reid patents relied upon by the defendant. The lower Totten patent is entirely encompassed by Amyx patents 38832, 38830, 38829, 38828, and 40628. Although there appears to be a minor difference in the overlap of those patents with the lower Totten patent, this property is clearly covered by the Reid patent. The upper Totten patent is substantially covered by preexisting Amyx patents 38827, 38834, and 40629. Again, the Reid patent envelopes the remaining portion. This court cannot find valid title in the defendant, as such relief was not requested. This court concludes only that

Noble has not shown valid title in himself to the subject property and his complaint must be dismissed.

This the 10th day of August, 1990.

(s) Joseph M. Hood
Joseph M. Hood, Judge

Date of Entry and Service: Aug. 13, 1990

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 76-370

CECIL G. NOBLE - - - - - - - - - *Plaintiff*

v.

NATIONAL MINES CORPORATION - - - *Defendant*

JUDGMENT—August 10, 1990

In conformity with the Memorandum Opinion of even date entered in the above-styled cause,

IT IS HEREBY ORDERED AND ADJUDGED:

(1) that the plaintiff's complaint be, and the same hereby is, DISMISSED and STRICKEN FROM THE DOCKET.

(2) that the defendant recover its costs expended herein. This the 10th day of August, 1990.

(s) Joseph M. Hood
Joseph M. Hood, Judge

Date of Entry and Service: Aug. 13, 1990